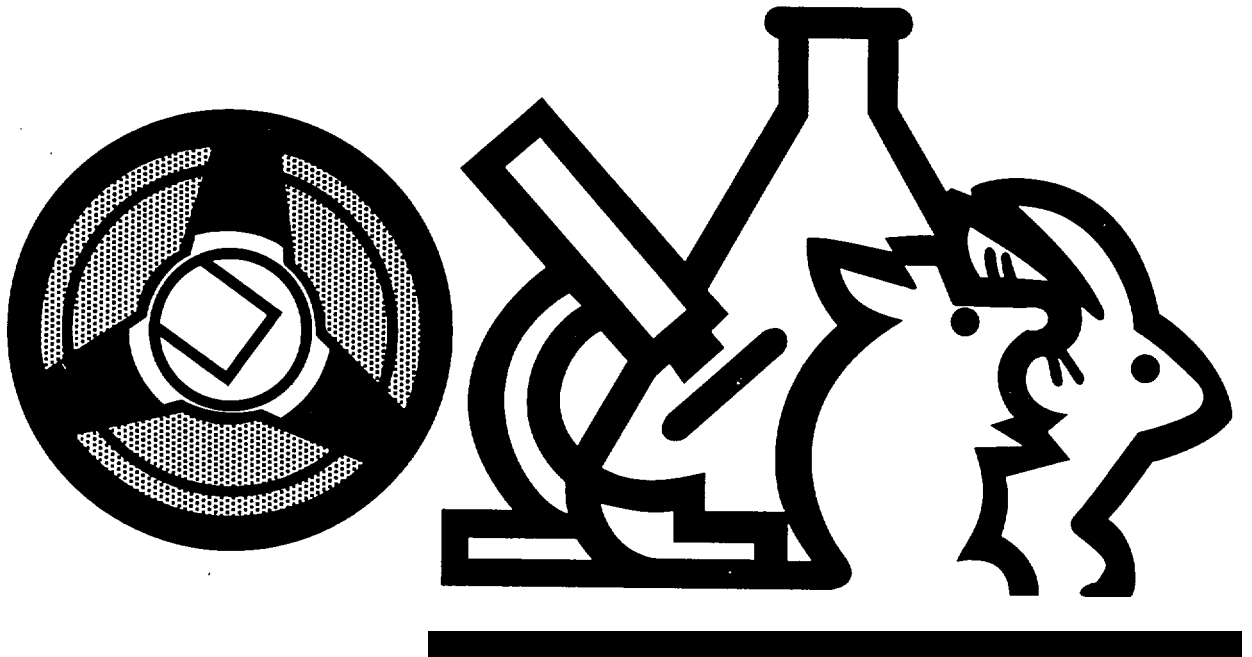


# DHHS PROJECT OFFICERS'



## *Contracting Handbook*



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Issued by  
Office of the Secretary  
Office of Grants and Acquisition Management  
Office of Acquisition Management

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## **SECTION I - INTRODUCTION**

Every year the Department of Health and Human Services spends millions on contracts. This represents a substantial commitment in person-power as well as in dollars because each contract must be planned and monitored by both a contracting officer and a project officer, whose duty it is to ensure that the Government receives fair value for its money and acts in a correct and legal manner. Although the responsibilities and specific duties of contracting officers are detailed in the Health and Human Services Acquisition Regulation (HHSAR), there has been no single HHS document that identifies or describes all of the responsibilities of a project officer. The HHSAR contains a great deal of information about the role of project officers, but it is scattered under 40 different headings and is, therefore, difficult to locate.

This handbook has been written specifically for project officers. It does not have the force of regulation, although it is based on the regulations. It is intended to guide project officers through the procurement process. This handbook outlines and explains many of the factors affecting the Federal procurement process, as well as the major steps in the process itself. It delineates the duties of the project officer, and explains which functions are the responsibility of the project officer and which are those of the contracting officer.

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### **THE ROLE OF THE PROJECT OFFICER IN THE CONTRACTING PROCESS**

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Once a decision is made to acquire products or services through the contracting process, a partnership is created between the project officers and the contracting officers. This partnership is essential to establishing and achieving contract objectives because these two officials are responsible for ensuring that the contracting process is successful.

Contracting officers and project officers have both separate and mutual responsibilities. The lead responsibility shifts from one to the other during the various stages of the contracting process.

During the pre-solicitation phase, the project officer has the lead, and the contracting officer operates in an advisory capacity.

However, as this phase ends and the solicitation and award phase begins, the lead responsibility shifts to the contracting officer, with the project officer acting largely as an advisor. During post-award administration, the project officer assumes lead responsibility for some functions, and the contracting officer for others.



The roles of project officers and contracting officers are different. Contracting officers sign on behalf of the Government and bear the legal responsibility for the contract. They alone can take action to enter into, terminate, or change a contractual commitment on behalf of the Government.

Project officers support the contracting officers. As representatives of the program office, they must ensure that program requirements are clearly defined and, must advise the contracting officer to help ensure that the contract is designed to meet them, that competitive sources are solicited, evaluated, and selected, and that the price the Government pays for the services it acquires is reasonable. They must establish quality standards and delivery requirements and make sure that these are met. While the contract is in force, project officers must ensure compliance with all contract provisions and applicable laws, and must report any deviations to the contracting officer.

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## **THE REGULATIONS**

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There are two separate sets of regulations governing the Federal acquisition process: the Federal Acquisition Regulation (FAR) and the Health and Human Services Acquisition Regulation (HHSAR). Although project officers do not usually use either of these documents extensively, they should be generally familiar with them. References to both documents appear in this manual. Copies of both can be found in the contract office.

The FAR is the primary regulation for use by all Federal agencies when they acquire supplies and services with appropriated funds. It was developed in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974, as amended by Public law (P.L.) 96-83. The FAR provides for coordination, simplicity, and uniformity in the Federal acquisition process. It is written in clear, straightforward language and is easy to use and understand.

The HHSAR implements and supplements the FAR. It was issued by the Department under the authority of 5 U.S.C.301 and Section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)). The HHSAR establishes uniform acquisition policies and procedures for the Department that conform to the FAR system. It contains all formal departmental policies and procedures governing the acquisition process or otherwise controlling relationships between the Department's contracting offices and contractors. As mentioned above, it contains frequent references to the specific duties of project officers, but these references are scattered throughout the document and are difficult to locate.

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## OVERVIEW OF THE HANDBOOK

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This handbook identifies and describes the responsibilities a project officer must fulfill. It begins with a section on acquisition basics that explains the fundamentals of contract and the basic principles of the acquisition process. It discusses the different funding mechanisms, methods of acquisition, and types of contracts. The next three sections deal with the three distinct phases of the acquisition process, and the specific responsibilities of project officers in each. Section III covers pre-solicitation activities; Section IV, the process of solicitation and award; and Section V, the crucial process of post-award administration.

The final section covers the standards of conduct that are particularly applicable to project officers. The glossary lists and defines standard acquisition terms that may be unfamiliar.

## **SECTION II - ACQUISITION BASICS**

This section of the Handbook describes the fundamentals of contract law and key basic principles of the Federal acquisition process. Familiarity with these basic concepts and terms can help project officers fulfill their responsibilities and know when to seek assistance from contracting officers when problems arise.

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### **DISTINCTION BETWEEN ACQUISITION AND ASSISTANCE**

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Acquisition encompasses the processes the Government employs to obtain goods or services through contracts or like instruments, such as purchase orders and basic ordering agreements. The acquisition process almost always results in a contract, which flows from an offer made by a bidder or offeror and an acceptance of that offer by a contracting officer on behalf of the Government.

Assistance describes the process in which the Government transfers money, property, services, or anything of value to recipients to accomplish a public purpose of support or stimulation authorized by a Federal statute. The instruments used to carry out the assistance process are grants and cooperative agreements. These instruments usually result from an application being made by a recipient and an acceptance being effected by a grants officer on behalf of the Government.

In general, the acquisition process is used when the proposed purpose of the instrument to be executed is "the acquisition by purchase, lease, or barter of goods or services for the direct benefit or use of the Federal Government." This quotation comes from the Federal Grant and Cooperative Agreement Act of 1977 (PL 95-224), which is intended to ensure that Government contracts and grants are used appropriately. HHSAR Subpart 307.700 also describes the difference between acquisition and assistance and gives Departmental policy on choosing the award instrument to be used.

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## CHOOSING THE FUNDING MECHANISM

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### GRANTS AND COOPERATIVE AGREEMENTS

The HHSAR states that grants or cooperative agreements should generally be used for:

General financial assistance (stimulation and support) to eligible recipients under specific legislation authorizing the assistance; and

Financial assistance (stimulation or support) to a specific program activity eligible for assistance under specific legislation authorizing the assistance.

Grants and cooperative agreements are quite similar. Usually the Department awards a grant when it contemplates no substantial involvement between itself and the recipient. When there is likely to be substantial Government and recipient involvement, a cooperative agreement must be used. This distinction in the degree of Departmental -recipient involvement is the major practical difference between the two award instruments.

Since this Handbook focuses on acquisition and contracting, it does not address assistance planning, execution, and management. project officers who need information in those areas are referred to the Department's Grants Administration Manual.

### CONTRACTS

Contracts are used when the Department needs to acquire goods and such services as:

Evaluation (including research of a valiative nature) of the performance of Government programs, projects, or grants initiated by the funding agency for its direct benefit;

Technical assistance rendered t o the Government or on behalf of the Government to any third party, including recipients of grants and cooperative agreements;

Surveys, studies, and research that will provide information the Government will use for its direct activities or will disseminate to the public;

Consulting services or professional services of all kinds, if provided to the Government or to a third party on the Government's behalf;

Training projects where the Government selects the individuals or group to be trained or specifies the curriculum content (fellowship awards are excepted);

Planning for Government use;

Production of publications or audiovisual materials for the conduct of direct operations of the Government;

Design or development of items for Government use or pursuant to agency definition or specifications;

Conferences conducted on behalf of the Government;

Generation of management information or other data for Government use; and

Research and development.

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## **CONTRACTING BASICS**

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### **NATURE OF A CONTRACT**

A contract can be defined as an agreement between two or more parties consisting of a promise, or mutual promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. Unlike most social exchanges of promises, a contract establishes a binding legal relationship that obligates parties to keep their promises. In nearly all Government contracts, one party is a "seller" obligated by the contract to provide goods or services. The other party is the Government which, as the "buyer," is obligated to pay for those goods or services.

All contracts contain these elements:

#### **Legal capacity to contract**

##### **Agreement:**

**Offer**--A proposal by a competent offeror that a contract be entered into;

**Acceptance**--The expression by the offeree of his/her assent to the offer and communication of that assent to the offeror; and

## **Lawful Purpose**

**Consideration**--Something of value in the eyes of the law exchanged by the parties to bind the agreement.

## **In accordance with Law and Regulation**

In Government contracting, the bid or proposal is the offer. It is made by an offeror seeking to enter into a contract with the Government. An Invitation for Bid (IFB) or a Request for Proposal (RFP) is not an offer. Rather these are called solicitations and are informational documents that express the Government's needs to the community of potential offerors.

When the Government, after bid opening or proposal review and negotiation, chooses one bidder/offeror to contract with, it performs the act of acceptance. The consideration in Government contracts is usually payment by the Government and delivery of supplies or services by the contractor.

There are other requirements for the formation of contracts. A contract must have a lawful purpose. It cannot violate a statute, for example. Contracts must be entered into by competent parties. They must be mentally and legally competent for the contract to be valid.

Contracts must have certainty of terms and conditions to be enforceable. Since courts have to rely on the meaning of the language of a contract to enforce it, this language must be clear and certain. Project officers' specifications or statements of work, for example, must communicate clear requirements. Although non-Government contracts may sometimes be oral, Government contracts (including modifications) are always in writing.

## **AUTHORITY TO ENTER INTO CONTRACTS**

Although the United States is a legal entity having authority to enter into contracts and administer them, it is a legal abstraction. It must act by and through "agents" or human representatives. An agent is a person who has been authorized by another (called the "principal") to act for him/her. An agent's acts are binding on the principal to the extent that these acts are within the authority given to the agent.

All persons involved in making or administering U.S. Government contracts act solely as agents of the United States and have only the authority delegated to them.

In the Department of Health and Human Services, as in other Federal departments and agencies, the authority to contract is delegated to certain key officials who, in turn, delegate this authority to contracting officers. Although contracting

officers, in turn, may delegate certain limited authority to administer parts of the contract, they are the only persons (with a few limited exceptions) authorized to enter into or modify contracts on behalf of the Department.

Contracting officers have an important stewardship role in the acquisition process. They act as the United States' agents for the acquisition of goods and services. They are responsible to ensure that contractors live up to their contracted obligations. Project officers must ensure that they do nothing to infringe upon unique contracting officer responsibilities. Project officers may be given certain limited authority to act on behalf of the contracting officers--particularly in providing technical direction to the contractor. This authority will be discussed in Section V of this Handbook, Post-Award Administration. It is important to point out that project officers cannot obligate the Government or change the terms or conditions of contracts. Only the contracting officer can do that.

Just as the Government requires agents to act on its behalf, so does the other party to the contract--the contractor. Agents will almost always be used by the contractor--necessarily so if the contractor is a corporation--to enter into and carry out the contract with the Government. One important difference is that only a person with actual authority (by statute, regulation, or contract terms) may bind the Government. An agent with apparent as well as actual authority may bind the contractor. Nevertheless, contractors usually try to limit and specify those who are its agents authorized to act on its behalf.

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## **METHODS OF ACQUISITION**

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Federal law defines acquisition methods and processes. Although these methods and processes differ substantially, they have in common the goal of enhancing competition in contracting. Full and open competition in Federal contracting is the norm. Deviations from the norm are possible but require careful justification and high-level approval.

Maximum competition is desirable from a public policy perspective.

It is also desirable because, if properly administered, competition in contracting will result in the timely delivery to the Government of quality products and services at a reasonable cost.

Acquisition can be looked at in two dimensions. One dimension describes the acquisition methods in terms of degree of competition. The other dimension describes the different process activities involved in implementing a particular method.

## **COMPETITION IN CONTRACTING**

There are three levels of competition in contracting:

- Full and open competition;

- Full and open competition after exclusion of sources; and

- Other than full and open competition.

Full and open competition is the most desirable and favored form of contracting. This category includes contracting through:

- Sealed bids;

- Competitive proposals; and

- Other procedures.

Sealed bidding is used when requirements and solicitations are clear and unambiguous. Contractors can prepare and submit bids and the Government can decide on award strictly on price and on factors related to price. After submission of bids no discussion between the Government and bidders is permitted.

Competitive proposals are offers made in response to solicitations that have the possibility of being interpreted with varying degrees of difference by offerors. Often, some discussion is required between the Government and offerors, resulting in modifications to those offers or proposals.

Whether sealed bids or competitive proposals are selected, under full and open competition there is potentially a large universe of prospective bidders or offerors. The more bids or proposals, the better the chances for the Government to obtain a good "buy."

The next degree of competition is obtained when the Government provides for full and open competition after exclusion of sources.

This procedure, somewhat less competitive than full and open competition, is used when the Government excludes certain potential bidders or offerors from consideration for a contract in order to establish or maintain alternative sources. This procedure is used to reduce the Government's dependency on one or a few sources or to increase the manufacturing or supply base for national defense reasons. When used for one of these purposes in the Department, approval by the head of the OPDIV (or the Assistant Secretary for



Management and Budget for OS actions) is required. Exclusion of sources is also used for set -aside of acquisitions for small businesses, small and disadvantaged businesses, and labor surplus concerns.

The least competitive method of acquiring goods and services is known as other than full and open competition. Under this method, a bid or proposal is solicited from only one or a few sources. This kind of contracting can be done only in limited circumstances:

Only one responsible source exists (a sole source acquisition).

The agency's need is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources solicited.

It is necessary to award the contract to a particular source or sources to maintain a mobilization capacity in a national emergency; or to set up and maintain a source of essential engineering, developmental, or research work.

An international agreement precludes full and open competition.

A Federal statute authorizes or requires acquisition through certain sources (e.g., Federal Prison Industries, certain agencies for the blind, utility services, and Government printing and binding).

Disclosure of the agency's needs would compromise the national security unless the number of solicited sources is limited.

An agency head determines that it is not in the public interest to have full and open competition. This determination must be made by the Secretary, who must notify Congress 30 days before contract award.

Detailed justifications are required for choosing other than full and open competition as a means of contracting. High -level approvals are also needed. These justifications and approvals are described in Section III of this Handbook.

## **ACQUISITION PROCESSES**

The second aspect of acquisition involves the process or steps carried out from solicitation to award. There are three acquisition processes: sealed bidding, contracting by negotiation,

and small purchases.

### **Sealed Bidding**

Sealed bidding is a method and process of contracting that employs competitive bids, public opening of bids, and awards. An Invitation for Bid (IFB) is prepared describing the Government's requirements clearly, accurately, and completely. These IFBs are then publicized in sufficient time to enable prospective bidders to prepare and submit bids. The bids are publicly opened at a predetermined time and place. The amount of each bid is publicly announced.

The Government evaluates each bid but holds no discussion with the bidders. An award is made to the responsible and responsive bidder whose bid is most advantageous to the Government, considering only price and price-related factors. A "responsive" bidder is one whose bid conforms to the terms and conditions of the solicitation.

A "responsible" bidder is one with adequate financial resources to perform the prospective contract; is able to meet the required delivery schedule; has a satisfactory record of performance; has a satisfactory record of integrity and business ethics; has the necessary organization, and business and financial systems (or the ability to obtain them) to handle the prospective contract; and has the required production, construction, and technical equipment and facilities (or the ability to obtain them) to perform the work.

Statute and regulations give preference to sealed bidding over other acquisition processes. Contracting officers must solicit sealed bids if:

- Time permits submission and evaluation of sealed bids.

- Award will be made on the basis of price and other price-related factors.

- It is not necessary to conduct discussions.

- There is a reasonable expectation of receiving more than one sealed bid.

If any one or more of these conditions is lacking, the Government can contract by negotiation.

Sealed bidding is used when the requirements are so clearly specified that the Government can be sure that prospective bidders will understand and be able to prepare a responsive bid. Further, price must be the factor that determines who "wins" the contract among equally responsible bids.

Only a firm fixed-price contract or fixed-price contract with

economic price adjustment clauses can be used in the sealed bidding process. Sealed bids are most often used to acquire supplies and equipment that are clearly specifiable and describable and to acquire services that are equally clean -cut. Examples of supplies are nearly endless. They include food, medical and scientific equipment, fuel, industrial chemicals, machinery, electrical and electronic equipment components, and hundreds of other categories.

Services that can be acquired through sealed bids include, but are not limited to, transportation, photographic services, provision of lodging and subsistence, certain repair and maintenance services, and housekeeping services.

### **Contracting by Negotiation**

Most acquisitions in which HHS project officers will be involved are made through the process of contracting by negotiation. If one of the four conditions for sealed bidding is absent, the Government uses this process. Because of the nature of the various missions of HHS, the Department's requirements often are such that it is not possible to develop a set of totally unambiguous specifications such as are required for sealed bids. In addition, given the nature of these requirements, award may have to be made on the basis of factors in addition to price or cost. These factors often relate to the proposed technical approach, and quality of the staff. In addition, the requirements and the specifications for such acquisitions often result in offers that must be clarified through discussion after they are submitted. Sealed bids cannot be used where discussions are required after the offer is made.

Contracting by negotiation includes several discrete steps. After the requirement is determined and the acquisition is planned according to Departmental requirements, an advance notice or synopsis must be published in the Commerce Business Daily to inform the contracting community of the forthcoming solicitation.

A Request for Proposal (RFP) is prepared and transmitted to a number of sources, many of whom comprise an established list of offerors and many of whom responded to the Commerce Business Daily synopsis. Offerors then prepare and submit proposals in response to the RFP. These proposals consist of a technical proposal and a business or cost proposal.

The technical proposals are evaluated against a set of technical evaluation criteria that were included in the RFP. The cost proposals also are evaluated to determine whether the proposed costs and prices are reasonable, and to determine the offerors' understanding of the work and their ability to perform the contract.

The contracting officer next determines which proposals are in the competitive range for the purpose of conducting written or oral discussions. The determination is made on the basis of cost or price and technical factors. Proposals are included in the competitive range when they have a reasonable chance of being selected for award.

The next step is the conduct of oral or written discussions. Although this is not a mandatory step, it is an usual one. During these discussions, the Government attempts to resolve uncertainties concerning the technical proposal and to provide the offerors with reasonable opportunity to submit cost or price, or technical revisions to their proposal as a result of the discussion.

After discussions are concluded, the contracting officer issues a request for best and final offers from all proposers in the competitive range. Usually, no further discussions are held although the Government has the right to reopen discussions and to request additional best and final offers.

The next step is final evaluation of best and final offers and selection of the source to perform the contract. Selection is made of that source whose best and final offer is most advantageous to the Government considering price and the other factors included in the solicitation.

Any type of contract may be used in the contracting by negotiation process. The foregoing steps constitute the negotiation process. This Handbook will discuss each step in more detail in later sections.

## **Simplified Acquisitions**

The Federal Acquisition Streamlining Act (FASA), Public Law 103-355, was enacted on October 13, 1994. The Act creates a threshold for the use of Simplified Acquisition Procedures (SAP, in lieu of the simplified procedures that used to apply to Small Purchases (up to \$25,000). Small Purchases no longer exist as a category; but are replaced by SAP procurements, which operate up to a new higher threshold, the Simplified Acquisition Threshold (SAT) of \$100,000.

The Simplified Acquisition Procedures exempt procurements from audit requirements, contingent fee certifications, and other requirements.

The simplified acquisition threshold (SAT) is \$100,000, but currently, most agencies may only use Simplified Acquisition Procedures (SAP) for procurements up to \$50,000. Agencies may only extend the use of Simplified Acquisition Procedures (SAP) for purchases between \$50,000 and \$100,000 when such purchases are conducted via a certified "Federal Acquisition Computer Network (FACNET) system.

Below \$50,000, the acquisition can be made by using one of the following simplified procedures:

Purchase orders;

Governmentwide Commercial Purchase Card;

Blanket purchase agreements ( BPAs).

Federal Acquisition Computer Network (FACNET)

The contracting officer makes the decision to use Simplified Acquisition Procedures but the project officer, during the acquisition planning process, is required to give suggestions and conduct discussions with the acquisition staff concerning approaches to acquisition.

There are some general principles relating to simplified acquisitions. First, except for micro-purchases of \$2,500 or less, they must be made in an atmosphere of competition. Acquisition office staff have to solicit oral or written quotations to ensure themselves that the prices quoted are reasonable.

Second, Simplified Acquisition Procedures must be used in ways that encourage acquisition from small businesses. Except for micro-purchases of \$2,500 or less, simplified acquisitions must be set aside exclusively for small businesses, unless the contracting officer finds that certain exceptional conditions exist.

Third, acquisitions using Simplified Acquisition Procedures should not be used to circumvent regular acquisition requirements. It is improper, for example, to break down into smaller acquisitions a requirement that will cost an aggregate of more than \$50,000, merely to permit the use of Simplified Acquisition Procedures.

## **Purchase Orders**

Purchase orders are offers by the Government to buy supplies or services upon specified terms and conditions, the aggregate amount of which does not exceed \$50,000. The purchase order is unique in Government acquisition in that it is an offer by the Government. Bids and proposals are offers by the prospective contractor; a contract comes into being when the Government accepts that offer.

On the other hand, purchase orders are Government offers that do not become part of a contract until the contractor indicates its acceptance by signing the purchase order document or beginning work or delivering the supplies. Quite frequently in the Department, contractors are not required to sign purchase orders. They exhibit the acceptance by beginning the work described in the purchase order.

Purchase orders sometimes follow the solicitation of quotations. While solicitations can be made orally, for complex or certain other acquisitions a Request for Quotation (RFQ) is issued by the Department. An RFQ solicits information from a prospective contractor about its price, and sometimes its approach and capabilities. The response to an RFQ by one organization or individual is not an offer. Rather it is an informational response that has no legal standing.

### **Governmentwide Commercial Purchase Card**

The Governmentwide Commercial Purchase card is designed to look like a regular VISA/MASTER card, so that stores will recognize it as a normal credit card with normal payment mechanisms. Each purchase card is issued with certain limits and restrictions coded electronically onto the magnetic strip on the back. As a purchase card holder, you are assigned two kinds of spending limits; a single-purchase limit and a monthly (cumulative) limit. Project officers and program managers who have purchase cards normally have a single-purchase limit of no more than the Micro-Purchase Threshold of \$2,500. Micro-Purchases are not required to be set-aside for small business concerns and they are not subject to the "Buy American Act".

### **Blanket Purchase Agreements (BPAs)**

BPAs are an example of an agreement used for filling anticipated repetitive needs for supplies and services. A BPA, in effect, is a charge account with a supplier. It has an overall price limitation that cannot be exceeded by the aggregate of all purchases made under it, unless the limit is raised by the contracting officer.

Under a BPA, separate acquisitions are made according to detailed but simple procedures. No one purchase can exceed the simplified acquisition purchase limitation of \$50,000.

### **Federal Acquisition Computer Network (FACNET)**

FACNET is the "Federal Acquisition Computer Network". The FAR defines FACNET as "the Governmentwide Electronic Commerce/Electronic Data Interchange (EC/EDI) systems architecture for the acquisition of supplies and services that provides for electronic data interchange of acquisition information between the Government and the private sector, employs nationally and internationally recognized data formats, and provides universal user access".

A typical FACNET transaction begins at the computer desktop of a contracting officer. Contracting officers enter data into FACNET by completing blanks on electronic, on-screen forms for RFQs, POs, and the like. From there, the data:

- 1) Enters a Gateway that translates the data to meet standardized EDI formats, encrypts the data as necessary, and routes the data to Network Entry Points.
- 2) Enters one of the two Network Entry Points ( NEPs - one in Columbus, Ohio and one in Ogden, Utah (both currently operated for all agencies by the Department of Defense). NEPs sort and route the data to Value Added Networks (VANS).
- 3) Enters the VANS. VANS are commercial information services (many of which are the same firms that provide on-line services to home computers). The VANS collect, sort, and distribute electronic information to and from vendors.
- 4) Arrives at the electronic desktop of individual vendors which have registered as "Trading Partners" with the Central Contractor Registration Center, (CCR) Columbus, Ohio.

The senior procurement executive of the agency, at HHS, the Assistant Secretary for Management and Budget, is responsible for certifying that a contracting office has implemented an "interim" FACNET system. This certification is made to the Administrator of the Office of Federal Procurement Policy (OFPP).

An "interim" FACNET certification means that the contracting office can use EC/EDI to: Provide widespread public notice of solicitations; Issue solicitations, and; Receive responses to solicitations and associated requests for information. The office must be able to perform these functions for contracts between \$2,500 and \$100,000.

"Full FACNET" means that the head of an agency, with OFPP concurrence, has certified to the Congress that the agency as a whole has implemented all FACNET functions and used FACNET for more than 75% of eligible contracts between the micro-purchase threshold and the Simplified Acquisition Threshold during the preceding fiscal year.

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## **TYPES OF CONTRACTS**

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The Federal Acquisition Regulation provides for two families of contract types: fixed -price and cost -reimbursement. Each family consists of variations of the type but the essential characteristics within each family are the same.

The contracting officer chooses the type of contract. This choice can be subject to negotiation with contractors. Project officers need to understand the characteristics of each major contract type because these can significantly affect acquisition planning and contract administration duties.

The contract types differ in two key respects. One difference is the amount of risk placed on the Government and the contractor. The other is the degree of contract management or administration that each type places on the Government.

### **FIXED-PRICE CONTRACTS**

Although there are several types of fixed -price contracts, the one most commonly used by HHS is the firm fixed -price contract. In this type, the contractor agrees to deliver all supplies or services at the times specified for an agreed upon price that cannot be changed (unless the contract is modified). If the contract price is \$100,000 and the contractor spends \$125,000, the contractor loses the difference. The contractor still must deliver all it promised and the Government need only pay the initially agreed upon price after delivery and acceptance of the supplies or services. On the other hand, if the contractor's costs were only \$80,000, it would make a profit of \$20,000.

Firm fixed-price contracts place maximum risk on contractors and little or no risk on the Government. The contractor has made a commitment in the contract to deliver all it promised in return for the specified consideration. The Government has the right to receive what it bought for the price it promised to pay. If the contractor fails to perform at the contract price, it is liable for breach of contract, which can bring severe additional costs on the contractor.

Because the risk is high to contractors, their incentive to perform according to the terms and conditions of the contract is quite high. Therefore, the Government's contract monitoring requirements are usually far less than those for cost -reimbursement type contracts. Project officers must monitor and review contract proposals and perform other contracting administration duties on fixed-price contracts. But the magnitude of this effort is



normally far less than for cost -reimbursement type contracts.

If firm fixed-price contracts confer maximum risk on contractors while minimizing Government risk and if they minimize Government monitoring responsibility, why aren't they usually used for Federal acquisitions? The main reason is that many Government requirements cannot be translated into the definable and clear -cut specifications needed for this kind of contract. For an offeror to prepare a proposal or agree to a fixed -price contract, the specifications must be quite unambiguous and contain little or no uncertainty. If such specifications are possible, then responsible potential contractors are willing and able to develop a fair and reasonably priced offer and to assume a reasonable risk.

Many requirements in the Department, however, cannot be specified with the certainty required for fixed -price contracts. In the absence of this certainty responsible potential contractors have no way of estimating the price of the work with the degree of accuracy needed for fixed -price contract risk.

Research and development, demonstration projects, the conduct of surveys and studies, and related requirements are typical examples of work that has too much uncertainty attached to it to use fixed-price contracts. If the Government tried to use a fixed-price contract to meet these needs, it would either result in offers from sources that are not responsible or capable of doing the work, or offers that have astronomically high prices attached to them to cover the great potential risk to contractors.

In addition to the basic firm fixed -price contract, there are several variations of the fixed -price type of contract. These variations are not widely used in the Department. Contracting officers are experienced in their use and decide on their appropriateness.

## **COST-REIMBURSEMENT CONTRACTS**

Cost-reimbursement contracts, the second family of contract type, are widely used in the Department. Like the fixed -price contract, there are several variations. The most common is the cost-plus-fixed-fee contract. This type of contract is used when the uncertainties involved in contract performance are of such magnitude that cost of performance cannot be estimated with sufficient reasonableness to permit use of fixed -price type contracts. Rather than guaranteeing to perform all contract terms and conditions at the specified price, the contractor agrees to deliver its "best efforts" to perform the requirements in return for costs incurred and a reasonable profit (fee). This type of contract provides for negotiations of estimated cost and a payment of a fixed dollar fee to the contractor. This fee cannot be changed unless the scope of work in the contract is changed by the

parties to the contract.

Because the contractor cannot specify the exact price of performing, a "total estimated cost" is agreed to. This total estimated cost represents the best estimate of both the Government and the contractor, agreed to in negotiations. It also is a contract cost limitation that the contractor cannot exceed, except at the risk of non-reimbursement. This limit can be changed by mutual agreement of the Government and the contractor through a modification to the contract.

Every cost-reimbursement type contract contains the Limitation of Cost clause limiting the Government's liability if the contractor exceeds the total estimated cost. The clause requires the contractor to notify the Government when it expects to reach 75 percent of the total estimated costs in the next 60 days.

Project officers should review the Limitation of Cost clause carefully. It spells out the essential nature of cost-reimbursement contracts in terms of contractor performance obligations and cost limitations. The Limitation of Cost clause can be found at FAR 52.232 -20. In cost-plus-fixed-fee contracts, the contractor's risk is minimal. The contractor only promises to do its best (or "use its best effort") to perform the work. No guarantee is given to the Government. Failure to do the specified work will not be a breach of contract, nor will it cost the contractor any money, so long as it used its best efforts.

The Government's risk is commensurately high. It has no guarantee that it will get the specified work. If the work is not completed and the maximum costs have been reimbursed to the contractor, the Government has two choices, equally unsatisfactory. It can elect (1) not to add funds to the contract and therefore not get any further work, or (2) to add money to the contract to fund the remaining work. This latter action is known as funding the cost overrun.

Cost overruns are an unavoidable risk of the cost-reimbursement type contract. While overruns are occasionally caused by contractor waste or inefficiency, far more often they are due to the unavoidable lack of certainty in contract requirements. Given the nature of the work acquired by cost-reimbursement contracts, contractor performance often evolves in ways neither the contractor nor the Government foresaw at the time of award.

Because of the high Government risk and the lack of guaranteed performance, cost-plus-fixed-fee contracts must be monitored far more closely than fixed-price types. The project officer must ensure that the contractor is indeed providing its best efforts and that the contractor is judiciously expending funds and controlling cost.

In addition to the cost -plus-fixed-fee contract, there are several other kinds of cost -reimbursement type contracts. Two kinds are used in the Department in addition to the cost -plus-fixed fee contract:

**Cost contract.** This contract type is identical to the cost-plus-fixed-fee contract except it contains no fee. Reimbursement is made only for appropriate costs. This type of contract is usually used for research and development work, particularly with non -profit education or other non -profit organizations.

**Cost-sharing contract.** This is a cost reimbursement contract in which the contractor receives no fee and is reimbursed for only an agreed -upon portion of costs. The contractor, in effect, agrees to share a portion of the costs in expectation of some future gain or benefit.

## **OTHER TYPES OF CONTRACTS**

There are other contract types besides fixed -price and cost-reimbursement. The most important, in terms of Departmental use, are described briefly below. Project officers should consult with contracting officers about the use of these types.

### **Indefinite Delivery Type Contracts**

If the exact delivery date is unknown when the contract is written, a choice may be made from three types of indefinite delivery contracts:

**A definite quantity contract** which provides for delivery of a specific amount of supplies (or the performance of services) within a given period, at designated locations, on the order of the Government.

**A requirements contract** which obligates the contractor to fill all the acquisition requirements of designated activities for specific supplies or services as the orders are placed during the contract period.

**An indefinite quantity contract** which is similar to the definite quantity contract, except that no specific quantity is stated. Instead, the contract establishes minimum and maximum limits on the amount that can be ordered at one time, and on the total quantity.

All indefinite delivery type contracts are fixed -price.

## **Time and Materials and Labor-Hour Contracts**

A time and materials contract provides for payment of supplies and services on the basis of the number of direct labor -hours required and the cost of materials used. The contract sets forth a rate of payment for each direct labor -hour; this rate, which is negotiated, includes an allowance for overhead and profit. The contract also provides that the Government reimburse the contractor at "cost" (as defined in the contract) for materials used. The labor -hour contract is a variation of the time and materials contract, differing only in that it does not provide for payment for materials. Use of the time and materials or labor -hour form of contract is suitable when neither the extent, the duration, nor the cost of the work can be estimated with reasonable accuracy at the start (for example, engineering and design services relating to production, repair, maintenance, or overhaul work).

These types of contracts are quite similar to cost -reimbursement contracts. They need intensive monitoring by project officers to ensure that the contractor is operating efficiently and that it is exercising effective cost management and control. Before these types of contracts are entered into, the contracting officer must prepare a document, called a determination and findings, that states that no other contract type is suitable to meet the requirement. Also, like cost -reimbursement contracts, time-and-materials and labor -hour contracts have ceilings that the contractor exceeds at its own risk.

## **Agreements**

**Basic agreements.** A basic agreement is a provisional agreement between the contractor and the Department that certain designated clauses will be incorporated by reference in future negotiated contracts. A basic agreement may be used when the Department or contracting activity plans to place a large number of contracts with a contractor and/or anticipates substantial recurring negotiation problems. A basic agreement is not a contract.

**Basic ordering agreements (BOAs).** A basic ordering agreement is similar to a basic agreement except that it also includes a description, as specific as practicable, of the supplies to be furnished or services to be performed when ordered and a description of the method of

determination of the prices to be paid. The BOA lists the activities that are authorized to place orders under the agreements, but it is not a contract and cannot be used to restrict competition.

### **SECTION III - PRE-SOLICITATION ACTIVITIES**

The negotiated contracting process has three discrete phases: preparing for the solicitation, soliciting and awarding the contract, and administering the awarded contract. This section covers the first of these phases--pre-solicitation activities. It outlines the basic tasks that the Government must complete before approaching the business community for proposals. It also addresses the responsibilities of the project officer, although many of these tasks require close cooperation with the contracting officer to be accomplished effectively.

The steps in this first phase of the contracting process are accomplished in a logical sequence and are designed to produce two major documents: the acquisition planning document and the request for contract (RFC). This section is comprised of three segments. The first segment outlines the steps leading to the development of the acquisition planning document. Because this document must specify which special approvals and clearances are required, a brief description of these approvals and clearances, and brief explanations about which situations require which approvals and clearances are also discussed.

The next segment deals with the RFC document, its purpose, and contents. The RFC is a detailed document. Many of its components are critical to ensuring that the Government receives quality products and services at a fair price once a contract is signed. Therefore, the text concentrates on the most complicated and critical of these components--explaining exactly what they should contain and how to produce them.

The last segment provides brief coverage of unsolicited proposals and special socioeconomic acquisition programs.

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#### **ADVANCE PLANNING AND SCHEDULING**

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Planning for an acquisition is the best way of ensuring that the product or service will be acquired in the most efficient, trouble-free manner. This process should begin as soon as a program need is identified and it is obvious that the need must be met outside the Government. Acquisition planning involves a general consideration of all the elements that will be required in connection with a particular acquisition. This process may be quite simple or very elaborate, depending on the cost, political

sensitivity, complexity, or importance of the item or service being acquired. Advance planning helps both the contracting officer and the project officer to efficiently procure outside services by enabling them to allocate and schedule the work involved in an acquisition, and to resolve potential problems early in the process.

Failing to schedule the overall acquisition workload of an office, agency, or OPDIV results in an inordinate percentage of contract awards being made in the closing months, weeks, and even days of the fiscal year. This excessive year-end spending invites increased intervention and scrutiny from Congress, the Office of Management and Budget, and the media. The key to avoiding this is to begin advance acquisition planning early in the fiscal year.

The main components of the advance planning and advance scheduling process are: developing the concept, implementing the Phase II Advance Acquisition Planning mechanism, writing the acquisition planning document, and obtaining the required approvals and clearances. Each is discussed below.

## **CONCEPT DEVELOPMENT**

Concept development is the first step in an acquisition. In this phase the agency realizes that an acquisition is necessary and defines, in broad terms, what this effort will entail. Concept development may include assessment of prior contract results, in-depth literature searches, and discussions with technical and scientific personnel, both within and outside the Government. These discussions may serve to determine interest, scientific approaches, technical capabilities, and the state-of-the-art relevant to the subject area. In holding such discussions with people outside the Government, care must be taken not to disclose advance information on any specific acquisition, proposed or contemplated, because to do so might create the impression that the Government has given the recipient an unfair advantage over other organizations subsequently solicited.

Once the concept has been formulated, it must be reviewed for program relevance, need, merit, priority, and timeliness by the appropriate management staff. In many agencies, the concept development phase is intimately connected with the agency's budget process because these agencies use the budget process as the primary means of identifying, defining, and approving agency acquisitions.

Although most project officers do not become involved with an acquisition until after the initial budgeting has been accomplished, project officers always have to deal with budget considerations. This happens, for example, when the initial cost of an acquisition is underestimated and additional funds are

required. Although it is important to have funds for an acquisition--especially a major one--included in the agency's budget, occasionally one that has not been included is turned over to a project officer. If funds have not been budgeted, it still may be possible to fund a particular acquisition. Project officers who are faced with this situation should contact their budget component for advice and guidance.

### **The Acquisition Planning Document**

The acquisition planning document is an administrative tool designed to enable the project officer and the contracting officer to accomplish the tasks required to acquire goods or services for the agency within a specific amount of time, thereby complying with the requirements of the Phase II Advance Acquisition Scheduling requirements imposed on their program. This document is developed before the preparation and submission of the formal RFC and serves as an advance agreement between program and contracting personnel.

It outlines a schedule of the steps to be taken to accomplish the acquisition, and serves to resolve problems early in the acquisition cycle, thereby avoiding delay of the award.

An acquisition planning document is required for:

- All new negotiated acquisitions that are expected to exceed \$100,000, except:

- Acquisition of architect -engineer services;

- Acquisition of utility services where the services are available only from one source; and

- Acquisitions made from or through other Government agencies.

- All two-step sealed bidding.

The Principal Official Responsible for Acquisition (PORA) must prescribe acquisition planning procedures for both negotiated and two-step acquisitions that are not expected to exceed \$100,000, and all sealed bid acquisitions regardless of dollar amount.

An acquisition planning document is not required for a contract modification that either exercises an option or adds funds to an incrementally funded contract, provided there is an approved acquisition planning document on file and there is no significant deviation from that plan.



## **Responsibilities for Acquisition Planning**

The acquisition planning document usually is prepared jointly by the project officer and the contracting officer, although the PORA may request that a different procedure be followed.

Project officers who expect to initiate acquisitions should discuss their requirements with the responsible contracting officer. These discussions should result in understandings on:

- The details of the acquisition plan;

- A schedule for completing the acquisition plan;

- Preliminary discussion on the work statement or specifications and appropriate evaluation criteria; and

- Preliminary discussions on the content and timing of the Request for Contract (RFC).

Contracting officers are required to coordinate with program personnel to ensure:

- Timely and comprehensive planning for acquisitions;

- Timely initiation of requests for contracts; and

- That program personnel have been instructed in proper acquisition practices and methods.

## **Format and Content of Acquisition Plans**

The Department does not prescribe a standard format for the acquisition planning document, but recommends the one provided below. All five of the content areas listed must be included in this document, regardless of the format adopted.

1. **Identification of Information.** The contracting officer should prescribe the information necessary for readily identifying a planned acquisition. The information may include items such as an acquisition planning document number, a request for contract number, applicable public law, name of program or project officer.
2. **Programmatic Considerations.** This section should include all or some of the following items:

**Description of the project, supplies, or services.** In addition to briefly describing the proposed project, supplies, or services, discuss all anticipated future requirements related to the acquisition. Identify and discuss any past, present, or future interrelated projects.

**Project funding.** Provide a summary of funds expected to be obligated for the entire project by fiscal year and phases. Include expenditures for previous years. Discuss the probability of obtaining future -year funding and/or what specific managerial action can be taken to ensure future funding, if applicable.

**Related projects and efforts undertaken to avoid duplication of effort.** Discuss efforts made to determine if existing projects, supplies, or materials will satisfy the requirement. Include any related in -house efforts, searches, and clearinghouse reviews conducted to avoid duplication of effort.

**Need for the project, supplies, services.** Discuss the need for the project, supplies, or services.

**Special program clearances or approvals.** Determine which special program clearances or approvals are required. Specify clearances or approvals applicable to this acquisition. (See page 29 for discussion of clearances and approvals.)

**Phasing.** Briefly describe discrete tasks or stages of accomplishment that are appropriate to phasing. Describe the performance evaluation criteria for each phase before proceeding to the next. (See page 45 for a discussion on phasing.)

**Government furnished material/facilities.** Indicate material and facilities that will be furnished to the contractor and any associated problems that may be encountered. Discuss possible inequities that may arise in furnishing the materials or facilities. Discuss screening efforts for availability of these items through GSA (General Services Administration) excess property schedules.

**Project risk.** Discuss major areas of project risk, including technical, cost, and schedule risk. Describe what efforts are planned to reduce risk. If an acquisition that is planned to be awarded using other than full and open competition represents a significant portion of a proposed contractor's business, discuss the effect on technical capability, schedules, changes in contractor workload, and related effects on cost.

**Reporting/delivery requirements.** Describe the basis for establishing the delivery and/or reporting requirements. Include the anticipated deliverables and time(s) for delivery.

**Replication, dissemination, or use of the results.** Discuss anticipated replication, dissemination, or use of the results. Describe who will use it and how it will be used. Include a description of the delivery system.

**Data, data rights, patents, copyrights.** Discuss data to be developed. Specify data to be delivered and data to remain in the contractor's possession. Discuss how the data are to be used, maintained, disclosed, and disposed of by the contractor. Discuss data that are subject to the Privacy Act or Confidentiality of Information clause. Discuss data to be delivered with limited rights, data where title would not vest in the Government, and anticipated copyrights or patents. Discuss whether or not the data will permit any follow-on acquisitions to be competitive.

**Post-award administration and monitoring.** Detail milestones that require periodic evaluation of the contractor's progress. Discuss any formal management systems to be used in contract monitoring including plans for post-award conferences and site visits. Delineate the timing of the periodic status reports.

**Technical evaluation plans.** Discuss plans for the technical evaluation of the proposals. State whether or not non-Federal technical evaluators will review the proposals, and identify potential conflict of interest

situations.

3. **Acquisition Approach.** This section should include:

**Proposed sources.** Include sources or categories of sources (if apparent). If other than full and open competition is to be used, discuss why competition is not feasible.

**Contract type.** Provide the rationale for recommending a particular type.

**Socioeconomic programs.** Discuss preliminary liaison with the Small and Disadvantaged Business Utilization Specialist (SADBUS) to determine if the acquisition is appropriate for the various socioeconomic acquisition programs; i.e., small business, disadvantaged business, or labor surplus area set -asides.

**Other considerations, as applicable.** Discuss special contract clauses and proposed HHSAR deviations, if required. Discuss circumstances such as the effect of a protest on a previous acquisition, special public law or regulatory requirements that place restrictions on the acquisition, special geographical restrictions, and use of a special type of synopsis. If necessary, address planned pre-proposal conference, preaward survey, and preaward site visits.

4. **Planning for the Acquisition Cycle.** This section should include discussion of the following:

**Scheduling considerations.** The project officer and the contracting officer should establish realistic dates that meet program needs for award, and that ensure timely delivery or completion of the project. The following factors should be considered in planning realistic dates:

- . individual project and contracting officer workloads;
- . planned, extended absences of either the contracting or project officer from the office; and
- . schedules that are consonant with

established office goals for overall  
orderly and balanced workloads.

**Acquisition planning schedule.** The following  
acquisition planning schedule should be  
included in all plans to the extent the items  
are significant or appropriate to the  
acquisition. Additional items may be added as  
appropriate.

## ACQUISITION PLANNING SCHEDULE

### Actions

### Date

Advance or sources sought synopsis released  
Advance or sources sought synopsis closed  
Synopsis evaluation received  
Request for contract received  
Special program approval received  
Synopsis publicizing proposed acquisition released  
Request for proposal released  
Preproposal conference conducted  
Proposals received  
Technical evaluation received  
Cost advisory or audit report received  
Equal opportunity clearance obtained  
Prerenegotiation conference conducted  
Negotiation completed  
Contract document prepared  
Contract approval completed  
Contract released  
Award

5. **Approvals.** All acquisition planning documents must be signed by the project officer and the contract negotiator. Acquisition planning documents for acquisitions estimated to be between \$100,000 and \$1,000,000 must be approved by the contracting officer. Acquisition planning documents for acquisitions established to be in excess of \$1 million must be approved by the PORA (Principal Official Responsible for Acquisition) or his/her designee. The designated official must be in a position no lower than the level above the contracting officer. One copy of all acquisition planning documents must be filed with the PORA or the designated official for planning purposes. The original acquisition planning document must be retained in the contract file.

### SPECIAL APPROVALS AND CLEARANCES

There are numerous types of acquisitions, or elements within an acquisition, that require particular approvals or clearances. The following special program approvals or clearances should be reviewed to see if they are applicable to the acquisition in question. Those that are applicable must be addressed in the acquisition planning document.

## **ADP Software, Hardware, and Services**

All proposed acquisitions of automatic data processing hardware, software packages, and services, as well as telecommunications equipment which exceed the thresholds stated in Chapter 4-10 of the HHS Information Resources Management (IRM) Manual must be reviewed and approved by the OS/ASMB Office of Information Resources Management (OIRM). The program office is responsible for obtaining this approval. The OIRM approval document (Delegation of Procurement Authority (DPA)) must be attached to the request for contract when it is submitted to the contracting officer. Contracting officers cannot initiate action on the request for contract until they have received a properly executed approval document (DPA).

## **ADP Systems Security**

Whenever a proposed contract action requires the design, development, maintenance, or use of an ADP system or the use of ADP resources, the program office is required to designate a responsible individual to serve as the ADP system manager. This individual will ensure, in coordination with the cognizant systems security officer, that ADP security requirements are met and that each contractor maintains an acceptable security program. All ADP systems, regardless of cost, are required to have a Certification of ADP Systems Security Adequacy signed by the ADP system manager and the cognizant ADP systems security officer. The contracting officer cannot initiate action on the request for contract until this certification is received. (See HHS IRM Manual, Part 6--Automated Information System Security, Transmittal Circular 82.02 dated 07/02/82, and OMB Circular No. A-130.

## **Evaluation Contracts**

Evaluation studies are defined as those seeking to formally assess existing Federal policies, programs, or their components. Such studies are performed to inform policy decision making officials concerning program performance, with respect either to program objectives or other significant intended or unintended effects. The Assistant Secretary for Planning and Evaluation (ASPE) must approve all evaluation projects for proposed solicitations, except those which have been included in an evaluation plan previously approved by the ASPE.

## **Paid Advertising**

Paid advertisements and notices to be published in newspapers and periodicals may be authorized by the contracting officer in accordance with the requirements and conditions set forth in FAR

Subpart 5.5. Requests for advertising must be accompanied by written authority to advertise or publish, giving the names of the newspapers or journals, frequency and dates of proposed advertisements, estimated cost, and other pertinent information. Paid advertisements should be limited to the publication of essential details of grant announcements, invitations for bids, and requests for proposals, including those for the sale of personal property, and for the recruitment of employees. (See also General Accounting Office Policy and Procedures Manual for Guidance to Federal Agencies.)

## **Printing**

FAR Subpart 8.8 defines printing as printing, binding, blank -book and microform work (including any items requiring the processes of composition, platemaking, presswork, or binding) for use of an executive department, independent agency, or establishment of the Government. The acquisition of printing by contract is prohibited unless it is authorized by the Joint Committee on Printing of the U.S. Congress. Specific procedures to be followed are contained in the Government Printing and Binding Regulations and the HHS Printing Management Manual.

## **Fraud, Abuse, and Waste**

All proposed acquisitions that concern the subjects of fraud, abuse, and waste must be reviewed and approved by the Inspector General or Deputy Inspector General. Written approval from either must be included in the request for contract.

## **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1980 ( P.L. 96-511), a Federal agency obtaining information from ten or more persons , other than from Federal employees within the scope of their employment , must obtain advance written approval from the Office of Management and Budget. The Act defines a "person" as an individual, business, organized group of individuals, or state or local government. Approval can be obtained by submitting Standard Form 83, Clearance Request and Notice of Action, and a supporting statement to the Office of Management and Budget . Specific procedures for obtaining approval can be found in Title 5 CFR Part 1320 and the HHS General Administration Manual Chapter 10 -20. Procedures for the approval may be obtained by contacting the OPDIV Reports Clearance Officer.

## **Contracts with Federal Employees**

Contracts between the Government and Government employees, or



between the Government and organizations that are substantially owned or controlled by Government employees may not knowingly be entered into, except for the most compelling reasons (See FAR Subpart 3.6). Authority to enter into such a contract must be obtained before contract award from either the Assistant Secretary for Management and Budget, the head of the OPDIV, or the regional director, or their designees. (See 45 CFR Part 73 and HHS Standards of Conduct.)

## **Publications**

All projects that will result in contracts in excess of \$2,500, and that include publications, must be reviewed and approved by the Office of the Assistant Secretary for Public Affairs (OASPA). Form HHS-615, Publication Planning and Clearance Request, should be forwarded to OASPA through the OPDIV Public Affairs Officer. Publications are defined in the chapter on publications in the Public Affairs Management Manual.

## **Public Affairs Services**

Projects for the acquisition of public affairs services in excess of \$5,000 must be submitted to the Office of the Assistant Secretary for Public Affairs (OASPA) for review and approval on Form HHS-524B, Request for Public Affairs Service Contract.

## **Audiovisual Services**

All audiovisuals must be acquired under the Government -wide Contracting System for Motion Picture and Videotape Productions, unless they are included in the exceptions to the mandatory use of the uniform system. (See the HHS General Administration Manual, Chapter 1-121.) Any proposed acquisition of an audiovisual project requires submission of Standard Form 282, Mandatory Title Check, to the National Audiovisual Center. When the results of this title check have been reviewed and approved, and the project officer has determined that existing materials are not adequate to fulfill the requirement, the project officer must prepare a statement to that effect. For acquisitions in excess of \$5,000, a copy of that statement, together with Standard Form 202, Federal Audiovisual Production Report, and Form HHS -524A, Request for Audiovisual material, must be submitted through the OPDIV Public Affairs Officer to the Office of the Assistant Secretary for Public Affairs (OASPA) for review and approval. The OASPA will then forward the Standard Form 202 and the statement explaining why existing materials are insufficient to the National Audiovisual Center. An approved copy of the form HHS -524A will be returned to the OPDIV for transmission to the contracting officer. (See the HHS General Administration Manual Chapter 1 -121.)

## **Privacy Act**

The Department's policy is to protect the privacy of individuals to the maximum possible extent while permitting the exchange of records required to fulfill its administrative and program responsibilities and its responsibilities for disclosing records to which the general public is entitled under the Freedom of Information act. The Privacy Act is applicable whenever the Department contracts for the design, development, operation, or maintenance of a system of records on individuals in order to accomplish a departmental function. The key factor is whether a departmental function is involved. Therefore, the Privacy Act requirements apply to a departmental contract when, under the contract, the contractor must maintain or operate a system of records to accomplish a departmental function.

The project officer should consult with the activity's Privacy Act Coordinator, and as necessary with the Office of the General Counsel, to determine whether or not the Act applies to the proposed contract. The RFC must contain a statement regarding applicability. When the Act is applicable, the project officer must prepare a "system notice" for publication in the Federal Register. This notice must describe the Department's intent, i.e., to establish a new system of records on individuals, to make modifications to an existing system, or to disclose information in regard to an existing system. A copy of the "system notice" should be attached to the request for contract. The contract cannot be awarded until the "system notice" has been published in the Federal Register. (See HHS Privacy Act regulation, 45 CFR 5b, and FAR Subpart 24.1.)

## **A-76 Review**

OMB Circular No. A-76 provides that it is the policy of the Government to rely generally on private commercial sources for supplies and services, if certain criteria are met, while recognizing that some functions are inherently Governmental and must be performed by Government personnel. It also provides that it is Government policy to give appropriate consideration to relative cost in deciding between Government performance and performance under contract. In comparing the costs of Government and contractor performance, the Circular provides that agencies shall base the contractor's cost of performance on firm offers.

The Circular and the Cost Comparison Handbook, Supplement No. 1 to the Circular, prescribe the overall policies and detailed procedures required of all agencies in making cost comparisons between contractor and Government performance. These documents state that in making cost comparisons, agencies shall:

Prepare an estimate of the cost of Government performance based on the same work statement and level of performance as apply to offerors; and

Compare the total cost of Government performance to the total cost of contracting with the potentially successful offeror.

These documents further provide that solicitations and synopses of the solicitations issued to obtain offers for comparison purposes shall state that they will not result in a contract if Government performance is determined to be more advantageous. They also state that each cost comparison shall be reviewed by an activity independent of the activity that prepared the cost analysis to ensure conformance with the instructions in the Handbook. Finally, the documents provide that, ordinarily, agencies should not incur the delay and expense of conducting cost comparison studies to justify a Government commercial or industrial activity involving ten (10) or fewer full -time equivalents ( FTEs). Activities below this threshold should be performed by contract unless in -house performance is justified. However, if there is reason to believe that inadequate competition or other factors are causing commercial prices to be unreasonable, a cost comparison study may be conducted. Activities exceeding ten (10) FTEs shall undergo cost comparisons, unless waived.

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## **REQUEST FOR CONTRACT**

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### **PURPOSE AND USE**

The request for contract (RFC) ends the presolicitation phase of an acquisition and begins the solicitation phase, in which the Government transmits its requirements to the business community, receives bids or proposals to meet those requirements, and awards a contract.

The RFC is largely what its name implies--a request from the project officer that the contracting officer begin the process necessary to award a contract. As such, the RFC package must provide all the information and documentation necessary for the contracting officer to successfully undertake the acquisition

process.

It is vital to the quality of the acquisition and timely placement of a contract that the RFC be transmitted to the contract office as early as possible. Generally, the RFC consists of an HHS -393 and appropriate attachments.

## **REQUIREMENTS**

As a minimum, the following documents/statements should be included in the RFC.

**Purpose of contract.** A brief description of the general requirements, including a citation of the legislation, if applicable, that authorizes the program/project.

**Background history.** A discussion of the background and necessity for the acquisition. Include prior, present, and planned efforts by the program office in the program area to which the requested contract is related, as well as closely related work that has been supported by HHS and other Federal agencies. Identify specific contracts and grants whenever applicable.

**Period of performance.** Specify the time period required for total performance and, if appropriate, for each phase of the work. Indicate the proposed starting date and required date of delivery for each deliverable.

**Estimated cost.** An estimate of the total cost to perform the proposed contract and an estimate for individual phases or areas of the work. Include an estimate of technical staff hours required to perform the service as well as any direct material.

**Reference material.** List and describe study reports, plans, drawings, and other data to be made available to the offeror for use in preparation of proposals and/or in performance of the contract. Information should also be provided as to whether such material is currently available and, if not, when it will become available.

**Government property/facilities.** If the Government is going to provide property or facilities (e.g., office space, telephone services) to the contractor for contract performance, identify the kind, quantities, and periods of use. If providing property to a contractor is being considered, the project officer should become familiar with the policies and procedures in HHSAR Subpart 345.

**Technical proposal instructions and evaluation criteria.**

Include any instructions or information that will help the offeror prepare a technical proposal. Also outline a system for evaluating technical proposals, the evaluation criteria, and the relative weights assigned to each. See HHSAR Subpart 315.7005(a)(6).

**Sources for solicitation.** Within a particular field of interest, a project officer becomes familiar with many potential sources and acquires knowledge of each source's technical capability, physical resources, experiences in a given area, and performance history. It is expected that the project officer will use this knowledge to develop a recommended source list. The project officer will also use appropriate business/scientific journals to identify new sources, in addition to those the contracting officer will obtain from advertising in the Commerce Business Daily. In developing a source list, the project officer must be careful to avoid improper vendor contacts. Additionally, it is incumbent upon the project officer to cooperate with the Small and Disadvantaged Business Utilization Specialist and contract specialist in identifying viable small, small disadvantaged and women -owned businesses, and labor surplus area concerns, to which Federal acquisition dollars can be targeted in accordance with statutory set-aside programs and executive orders.

**Data for future acquisition.** State whether, at the conclusion of the proposed contract, it is anticipated that another acquisition action will be required. If so, the kinds and amounts of technical data required from the proposed contract should be indicated to assure competition in future acquisitions and to prevent the contractor from becoming a sole source because the Government lacks the data, e.g., drawings, techniques, test results, etc., to permit a full and open acquisition.

**Deliverables.** Prepare a list of any deliverables (products, reports, etc.) required under the proposed contract and the timeframes within which they are required.

**Special approvals/coordinations/clearances.** Attach copies of required clearances and approvals. If they are not attached to the RFC, a note explaining the action taken to obtain approvals should be included.

**Statement of work/specification.** Submit the statement of work or specification with the RFC.

**Special terms and conditions.** Identify any special terms/conditions should be included in the contract.

**Identification and disposition of data.** Identify the data expected to be generated by the acquisition and specify the data to be delivered to the Department (see HHSAR Subpart 315.7005(b)(2)) and that to be retained by the contractor. Include information relative to the use, maintenance, disclosure, and disposition of data; a statement as to whether or not another acquisition, based upon the data generated by the proposed acquisition, is anticipated; and a statement indicating whether the proposed acquisition is or is not subject to the Privacy Act (see FAR Part 24.1 and HHSAR Subpart 324.1).

**Justification for other than full and open competition.** A full explanation of why it is impossible or impractical to obtain competition for the acquisition. If the acquisition is to be sole source, include a certification statement, that only the one source has the necessary competence or resources to fulfill the contract requirements. (See page 60 for more detailed discussion.)

**Identification of the project officer.** Identify project and alternate project officers by name, title, full mailing address, and telephone number. Include a statement as to whether they have completed the requisite training prescribed by the Department (see HHSAR 307.170).

## **THE STATEMENT OF WORK**

The statement of work (SOW) is probably the single most critical document in the acquisition process. It describes the work to be performed or the services to be rendered, defines the respective responsibilities of the Government and the contractor, and provides an objective measure so that both the Government and the contractor will know when the work is complete and payment is justified.

The SOW must be precisely worded because it will be read and interpreted by a variety of people, such as attorneys, acquisition personnel, cost estimators, accountants, technical specialists, etc. If the SOW does not state exactly what is wanted, or does not state it precisely, it will generate contract management problems for both the project officer and the contracting officer. Ambiguous statements of work often result in unsatisfactory contractor performance, delays, disputes, and higher contract

costs.

Statements of work are sometimes referred to administrative boards or the courts for interpretation. These interpretations represent what an objective third party thinks is the intention of the document. Generally speaking, the court or board will not concern itself with what the drafter **intended** to express, but will look at what **was** expressed. This determination is usually made solely on the basis of the words used and the context in which they appear.

How the SOW is written affects the entire acquisition cycle. It determines the type of contract that is awarded, it influences the number and quality of proposals received, and it serves as a baseline against which to evaluate proposals, and later, contractor performance. Thus, the SOW is the key element in shaping and directing all three stages of the acquisition cycle: pre-solicitation, solicitation and contract award, and post -award administration.

In the pre-solicitation phase, the SOW establishes the parameters of the Government's requirements so that the program and contracting officers can determine the best way to accomplish them. Therefore, the SOW must articulate program objectives. It must also establish actual minimum requirements for performance of the proposed work.

In the solicitation and award phase, the SOW is the vehicle that communicates the Government's requirements to prospective offerors.

At this stage, the SOW guides the offerors on the content of their technical proposals. When a contract is awarded, the SOW becomes part of the contract between the two parties, stating what has been offered by the proposer and accepted by the Government. Therefore, the statement of work defines the scope of work, including tasks the contractor must undertake, types or stages of work, number and type of personnel, sequence of effort, and reporting requirements. The SOW must also establish a guide for technical evaluation of the proposals. Both the offeror and the evaluators need a list of factors that clearly state how the agency will compare the offers. The technical evaluation criteria are not part of the SOW itself but, because they relate directly to the requirements specified in the SOW, they must be carefully considered when preparing it.

At the post -award stage, the SOW provides the mechanism for defining the work or products that are to be produced and the deadlines for producing them. To be effective at this stage, the SOW should provide a guide for monitoring the progress of work by specifying what products should be delivered or tasks accomplished at specific times during the course of the contract. The SOW also should describe the products to result from the work effort and set the standards of contractor performance.

## COMMON ELEMENTS OF STATEMENTS OF WORK

Because each acquisition is unique, each SOW must be tailored to the specifics of the project. The elements of a SOW will vary with the objective, complexity, size, and nature of the acquisition. In general, it should cover the following matters, as appropriate.

**Background.** Describes the requirements in general, non-technical terms, and explains why the acquisition is being pursued and how it relates to past, current, or future projects. Include a summary of statutory program authority and any regulations that are applicable. If any techniques have been tried and been found to be effective, they should be included here.

**Project objectives.** Provides a succinct statement of the purpose of the acquisition. It should outline the results that the Government expects, and may also identify the benefit to the program that is contemplated.

**Scope of work.** Provides an overall, non -technical description of the work to be performed. It expands on the project objectives, but does not attempt to detail all of the work required. Identify and summarize the various phases of the project, and define its limits in terms of specific objectives, time, special provisions, or limitations. This information must be consistent with the detailed requirements. Contractor responsibilities are often summarized here, as are the results or products expected.

**Detailed technical requirements.** States most precisely what is expected of the contractor in the performance of the work. It describes the specific tasks and phases of the work and specifies the total effort each task or phase is to receive. Considerations that may guide the contractor in its analysis, design, or experimentation on the designated problems should also be included.

Specify the requirements (i.e. training, computer modeling, tests, verification, etc), and indicate the scope of each. Include the parameters of tests, for example, and the criteria governing the number of designs, numbers of tests, performance, etc. Also identify any budgetary, environmental, or other constraints. If more than one approach is possible and the Government prefers a particular approach, it should be identified. When applicable, state the criteria on which a choice of alternative approaches will be based.

If end products or deliverables are required under the contract, they should be clearly and firmly defined and



the criteria for acceptance should be given. Delivery or completion schedules are expressed either by calendar date or as a certain number of days from the date of contract award. When using the latter method, specify whether work days or calendar days are meant.

**Reporting schedule.** Specify how the contractor shows that it has fulfilled its obligations. Define the mechanism by which the contractor can demonstrate progress and compliance with the requirements, and present any problems it may have encountered. This is usually accomplished through monthly or bi-monthly progress reports. Discuss what areas the reports are to cover, the report format, the number of copies the contractor should submit, and to whom they should be submitted. Clearly identify the criteria to be used by the Government for acceptance.

It is important to require the preparation and submission of technical and financial progress reports to reflect contractor certification of satisfactory progress. If possible, the reports should be coordinated to provide a correlation between costs incurred and the state of contract completion.

**Special considerations.** Include if there is any information that does not fit neatly or logically into one of the other sections. For example, to explain any special relationships between the contractor and other contractors working for the Government.

**References.** Provide a detailed list and description of any studies, reports, and other data referred to elsewhere in the statement of work. Each document should be properly described, cited, and cross -referenced to the applicable part of the work statement. If documents are limited or hard to get, and will not be attached to the RFP, tell where they can be obtained, or when and where they will be available for review. Examples of references include: field memoranda, technical reports, scholarly studies, articles, specifications, and standards.

## **STEPS IN WRITING A STATEMENT OF WORK (SOW)**

Because the SOW is the most influential document in an acquisition, it must be carefully planned and written. It expresses what the contractor is to accomplish and determines whether the Government receives the product or service it needs.

### **Planning the Statement of Work**

Carefully planning the SOW will save time in the writing phase and will make it possible to develop a concise, trouble -free RFP. The first step is to determine the project's objectives. This involves developing clear statements about why the agency is undertaking the acquisition, and what it hopes to achieve. Such a statement is critical because it is impossible to communicate a requirement to potential offerors unless the need can be clearly stated.

Once the project's objectives have been stated clearly in writing, the next step is to meet with the contract specialist, who will help lay out the requirements for the acquisition and the schedule that must be met if a contract is to be awarded by a specific date.

The contract specialist can also identify sources of information on regulations and contracting, as well as in -house experts who may be able to help.

The next step is to determine all of the individual requirements that must be accomplished if the agency is to meet its objectives.

Requirements that need to be considered at this stage include:

#### **Deliverables**

- What products/services are required?
- Who will use the products and how?

#### **Standards of Performance**

- What performance/accuracy standards can be specified for the products or services?

## **Personnel**

- What categories of staff should conduct the project for the contractor?
- What should be their qualifications?
- What should be the qualifications/experience of the contractor?

## **Methodology**

- What is the appropriate methodology?
- Are there different possible methodologies?
- What stages/phases can the project be broken into?

## **Schedule**

- When are the results of the project needed?
- How long should the project take?
- What is the schedule for the deliverables?

## **Location**

- Where should the project take place?
- Will travel be required?

Once all of the requirements have been listed, they can be arranged into a logical sequence.

During the process of listing the requirements, it may be helpful to do some background reading. Collect and analyze previous documents and contract deliverables that bear on the requirements, including:

Documents that discuss overall program goals and objectives;

Reports, manuals, or other deliverables produced in the past; and

Statements of work developed for similar projects.

Review Government -wide or departmental regulations, policy directives, or administrative memoranda that apply to the type of acquisition under consideration. Consult with other program personnel to elicit views on the project, its objectives and requirements.

At this stage, it is important to decide if the complexity of the project requires advice from technical specialists or help from

additional writers. If so, identify the personnel needed and specify the areas that each should address.

### **Specifying the Contractual Approach**

Once the project objectives have been clearly stated and the requirements listed, it becomes possible to begin specifying the contractual approach. This process will require a number of decisions:

Whether the work statement is a design specification, a performance specification, or a combination;

Whether a completion contract or a level -of-effort contract is contemplated; and

Whether or not phasing is appropriate.

Each of these decisions will be discussed in more detail below, but as these decisions are being made, a few points should be kept in mind. The objectives of a proposed project will affect the amount of flexibility the contractor will be allowed in designing an approach to the work. A SOW may be broad and general, or specific and detailed. But whether a statement of work is loose or tight, simple or complex, certain general principals apply. The SOW:

Should neither be so narrow as to restrict the contractor's efforts nor so broad as to permit the contractor to explore or undertake work in areas having little relationship to the particular contract tasks.

Must define the contractor's obligations and be definitive enough to protect the Government's interests.

Should give the contractor sufficient guidance to be able to perform the work required. It should provide a clear, unambiguous, and complete basis for effective and efficient performance.

### **Performance Specifications versus Design Specifications**

A work statement may be a design specification, performance specification, or a combination of both. A **design specification** describes the specific materials, parameters, and methods a contractor is to use in delivering a project or service to the Government. The Government is responsible for the results. The contractor must follow the specified steps, but the Government is responsible for ensuring that following these steps will produce the desired result. For example, if the Government issues a design specification for a testing program, the contractor would be

responsible for implementing the program but not for the validity or usefulness of the test results.

A **performance specification**, on the other hand, does not limit a contractor to providing a specific product or service, but rather describes what the contractor must do, what form this effort must take, and the constraints placed on the effort. Performance work statements tell the contractor the objectives to be accomplished, the end goal, or the desired achievement. For example, a performance work statement for a training course might specify the skills to be taught and the level of skill that participants are to achieve. It is then the contractor's responsibility to specify in its proposal how these objectives will be accomplished.

As a general rule, it is best to place maximum responsibility for performance on the contractor, because the contractor is being hired for its expertise and ability to perform. However, the cost of the contract may be higher if the contractor must determine the proper approach and methods. Consequently, if the program office or agency believes it knows a good method for accomplishing its objectives, the cost benefit of specifying this method in the statement of work should be weighed against the risk that contractors may know even better methods.

Often work statements use a combination of design and performance specifications. If a decision is made to use such a combination, the Government must be certain that by adhering to the Government's specifications, the contractor can achieve the required result.

### **Term versus Completion Statements of Work**

Careful distinctions must be drawn in the SOW between a term (or level-of-effort) acquisition and a completion acquisition. Term contracts require that the contractor furnish a report on technical effort during a specified period of time, while completion contracts often require the contractor to develop a tangible end item that is designed to meet specific performance characteristics.

A **term or level-of-effort** SOW is appropriate for research where the Government is seeking to discover the feasibility of later development, or to gather general information. A term or level-of-effort statement of work may only require that a specific number of labor-hours be expended on a particular course of research, or that a certain number of tests be run, without reference to any intended conclusion. For example, a level-of-effort contract might entail providing a certain level of maintenance services or technical support.

A **completion-type** SOW is appropriate to development work where the feasibility of producing an end item is already known.

Completion-type statements of work may describe what is to be achieved through the contracted effort--such as the development of new methods, new end items, or other tangible results. For example, a completion requirement might entail delivering a final study report, submitting test results, or developing and delivering documentation on a computer program.

Whichever method is selected, the SOW should be definitive and precise. In describing an end item, for example, be specific about the characteristics it must possess and the standards it must meet.

In a level-of-effort SOW, where results of the effort are not measurable, be specific about the goals and directions toward which the contractor is to deploy resources.

## **Phasing**

Individual research, development, or demonstration projects frequently lie well beyond the present state of the art and entail procedures and techniques of great complexity and difficulty. Under these circumstances, a contractor, no matter how carefully selected, may be unable to deliver the desired result. Moreover, the job of evaluating the contractor's progress is often difficult.

Such a contract is frequently divided into stages (or phases) of accomplishment, each of which must be completed and approved before the contractor may proceed to the next. When phases of work can be identified, the statement of work should provide for phasing and the request for proposals will require the submission of proposed costs by phases. The resultant contract will reflect costs by phases, require the contractor to identify incurred costs by phases, establish delivery schedules by phases, and require the written acceptance of each phase.

Phasing makes it necessary to develop methods and controls, including reporting requirements for each phase of the contract and criteria for evaluating the reports submitted that will provide, at the earliest possible time, appropriate data for making decisions relative to all phases. A phased contract may include stages of accomplishment such as research, development, and demonstration. Within each phase, there may be a number of tasks that should be included in the statement of work.

Phasing should not be used for projects where several tasks must proceed simultaneously because if each task is made a separate phase, progress will be blocked by lack of data.

## **Outlining and Writing the SOW**

Once the individual requirements for accomplishing the project objectives have been clearly stated, and the contractual approach has been specified, the next step is to outline the SOW. An outline provides a structure for the document and saves a great deal of writing time. A detailed outline makes it easier to focus on content and to spot inconsistencies, redundancies, and gaps that may need to be filled. It saves time in the writing phase by providing a clear picture of the inter-relationship among ideas, and the most logical order to present them.

Once the outline has been completed, write a first draft. Remember that the purpose is not to create an entertaining piece of literature, but to express a need and state requirements so that a contractor can understand and respond to them. The next section of this chapter gives specific suggestions for ensuring that the SOW is clear. In general, however, the object in writing a first draft is to get the ideas down on paper. Follow the outline, and write one part at a time. Write as much as possible at a time, but don't try to revise the first draft as it is being written. Include enough detail to communicate clearly with the reader. Explain and illustrate points wherever it is necessary to convey the correct meaning.

## **Revising the Statement of Work**

When the first draft is complete, it will need to be rewritten and revised. The writer should read the statement of work several times with a view to revising it. The first time, check only the content:

- Does it contain sufficient information?
- Are more examples needed?
- Are the sources the best obtainable?
- Has too much material been included?
- Is the writing based on sound reasoning?

The second time through, check the effectiveness of the organization.

- Is the subject stated clearly?
- Is the subject advanced in clear stages?
- Is the connection between the stages clear?

During the third reading check the sentence structure and grammar.

The next part of this Section provides suggestions on what to look for during the third reading and some pitfalls to avoid.

Revise the statement of work, read it again, and continue this process until it is logical and readable, conveys exactly what is required of the contractor, and emphasizes the critical elements. One of the best ways of determining if a statement of work meets these design objectives is to have it reviewed by someone else in the program office. Writers often have trouble critiquing their own writing because they tend to read into their own work what they intended it to say instead of what it actually says.

### **Hints for Writing Statements of Work**

The basic purpose of all writing is to convey a meaning to a reader. The quality and clarity of the writing will determine whether or not that purpose is accomplished. If the writing is unclear, the reader will not understand the message; if it is wordy, the reader will waste time trying to determine the meaning and may misinterpret it. If the language is unfamiliar or too technical, the reader may misunderstand or lose interest. There are many good books on how to write clearly and effectively. Strunk and White's The Elements of Style is one of the shortest and best and is extremely useful to anyone who needs to communicate by writing. There are, however, some writing pitfalls to which those writing statements of work are particularly susceptible. The list that follows contains some of these, along with some suggestions for how to avoid them.

**Use simple, direct, and clear language.** Considerable clarity can be achieved by using short, clear, well-understood words. Avoid technical language unless its meaning is well understood or unless it is defined in the statement of work itself. Words with multiple meanings and vague words also should be avoided unless they are defined.

**Use active verbs.** Passive verbs can be vague. For example, say "the contractor shall perform....", not "it shall be performed...." because the latter leaves the question of who shall do the performing open. This is particularly important in research and development acquisitions where many of the contractor's activities depend on the Government supplying certain information first.

**Use adjectives sparingly.** Many times adjectives soften nouns and make their meaning vague instead of adding clarity. For example, using adjectives such as "workmanlike," "successful," "substantial," and "reasonable" to modify the description of work the contractor is to perform tends to decrease the contractor's obligation rather than increase it.



**Use language consistently.** Do not change a word or phrase unless a change in meaning is intended. The repetition of long, awkward phrases can often be avoided by inventing an arbitrary name and using that consistently; thus, "the XYZ Company, Inc. (herein called the Contractor)."

**Take care in employing modifiers and exceptions.** These can cause confusion when the reader is unsure of the reference. If a modifier comes at the end of a long series of phrases, it is sometimes impossible to determine if the modifier refers to the entire series or merely to the last item.

**Use and/or sparingly.** The use of and/or can be confusing. This is one place where the rule of using as few words as possible can be ignored. For example, if the SOW says, "The contractor shall supply A, B, and/or C," is the firm in compliance if it supplies A and C? Or can it merely supply C, under the assumption that "and/or" meant that supplying C was sufficient? If the writer really means that the contractor has the choice of supplying any or all of the three items, it is better to say, "The contractor shall supply either, A, B, or C, all of them, or any combination of them."

In addition to the specific uses of language mentioned above, there are certain elements in the statement of work that often cause confusion:

**Time.** One of the big problems in writing a SOW is to specify when something must be done. It is best if the obligation is made certain. "On January 1, the contractor shall submit a report...." But sometimes the report will depend on certain other contingencies. One of the most annoying contingencies is the uncertainty as to the time when the contractor started work or was permitted by the Government to start work. For this purpose, drafters like to say, "deliver within 90 days...." Be sure to specify 90 days from when. Avoid "90 days from the award of the contract" because this is ambiguous. "Awarded" might mean the time the Government decided who the contractor was to be, the date of approval by the contracting officer, or the date the contract was signed. To avoid this kind of ambiguity, say "90 days from the effective date of the contract ." The "effective date" is defined by the phrase: "The contract made as of the 1st day of January...." and it gives a firm base from which to start.

**Notices.** Frequently a SOW requires that a report be delivered to a certain person. Generally, it is better to specify this person by title rather than by name, because Government personnel changes are sometimes frequent.

**Incorporation by reference.** Often there is a need to incorporate some other document into the SOW. When this is done, it should be clear. The incorporated document should be completely identified by date, by title, and by revision number, if applicable. It should be attached, unless it is too cumbersome; then its location should be identified. If "standard tables" are incorporated, the drafter should be clear about which tables these are and know exactly what they say. They may include material that might be objectionable to the Government.

**Agreements to agree.** Caution should be exercised in "agreeing to agree" in the future on some significant point, because this may cause difficulties, later. If "the model is to be painted a color to be mutually agreed upon" and the drafter really does not care what color it is, then no harm is done. But if the color is significant, the matter should not be left open.

**Theoretical discussion.** Sometimes theoretical discussion is included in a SOW, with confusing results. If it is necessary to include scientific background or theoretical reasons for doing the work, the drafter should try to do this in a separate part of the SOW so that there will be a clear line of demarcation between the "why" and the "what." The SOW ideally should consist of a description of work, not theoretical discussion. The inclusion of the latter may have the effect of modifying the instructions so that the contractor is given a reason for not performing in accordance with the drafter's wishes or for doing something that was not desired.

**Government obligations.** Care should be taken in describing what the Government is supposed to do. Frequently the contractor's obligation to perform will depend on what the Government does first. If the Government does not perform its part, the contractor will be excused from performing. If it appears that the Government has not performed, then the contractor will have the foundation for an excuse, even if the Government has done its part. This situation may arise when it is not sufficiently clear what the Government is to do and when.

As an example, the phrase, "Based on information supplied by the Government the contractor shall..." leaves open

what information the Government should supply. It could be a great deal; it could be very little. There is no way of knowing whether it is significant or not, costly or inexpensive.

There is no way of determining when the Government has supplied this information. But the contractor is in a position at any time to claim that whatever it was, the firm did not have it. Furthermore, the contractor is in a position to claim that even if it did get it, it did not get it soon enough. Tell precisely the kind of information the Government will supply, and when. Limit the obligation to supplying information or services that are readily available to the Government. Do not agree to give information or services that the Government does not have or that may cost a great deal to get.

### **INDEPENDENT GOVERNMENT COST ESTIMATES**

Contractors responding to an RFP must submit a cost proposal in addition to a technical proposal. Although the acquisition process is designed to ensure price competition, the project officer needs to make sure that the prices offered are within the range that the program has budgeted for a particular acquisition. Therefore, the Government requires that an "Independent Government Estimate of Costs" be submitted by the project officer as part of the request for contract. This document is the Government's assessment of the probable cost of the supplies or services to be acquired. It assures that program funds are available for the acquisition, assists in the assessment of the utility and cost of individual tasks as they relate to the overall project, and serves as a basis for determining the reasonableness of an offeror's proposed costs and understanding of the RFP.

There are two types of cost estimates: detailed cost estimates and lump sum estimates. Detailed cost estimates are the most common and are almost always required. They analyze the individual cost elements of an anticipated proposal. These estimates are made by task and relate directly to the statement of work. A lump sum estimate projects the cost of the acquisition on a gross basis, without regard to individual cost elements. This type of estimate may be prepared when the ultimate award price can be determined without examining individual cost elements and profit. For example, a lump sum estimate may be used when price is controlled by competition for specific hardware requirements.

## STEPS IN DEVELOPING INDEPENDENT COST ESTIMATES

Detailed cost estimates should be prepared by the project officer, although the contracting officer can often help with advice on approximate overhead and General and Administrative rates.

The following step-by-step procedures may be used in developing detailed cost estimates. If the statement of work has been written, several of these steps will already have been accomplished.

1. Divide the effort into identifiable tasks or logical steps.
2. List the categories of labor that will be required in each task or step, i.e., clerical, engineer, research scientist, engineer, etc. In a "level-of-effort" acquisition, it is necessary to consider, in as much detail as possible, the categories of expertise desired and the training and experience that will be required for each category. This will yield a more accurate estimate.
3. Estimate the per -day or per -month cost of each category of labor.
4. Estimate the total effort from each labor category by task in terms of person days or person months.
5. Multiply the number of person days or months in each category by the estimate of time required. This will yield the estimated direct labor cost.
6. Estimate the amount and type of materials and supplies that will be required and the cost of each.
7. Identify any other elements of direct cost that the acquisition may require, such as consultant services, computer rentals, etc., and estimate the cost of these.
8. Estimate the travel requirements, if any. Identify the destinations, the number of people involved, the length of each trip, and the total number of trips anticipated. Use this information to estimate the cost of this travel in terms of both transportation and per diem.

9. If a subcontractor will be required, identify the tasks to be subcontracted and estimate the cost.
10. Estimate the amount of overhead that will be charged.

When all of this information has been collected, a detailed cost estimate can be prepared. The sample format shown on the next page may prove helpful.

# SAMPLE FORMAT FOR INDEPENDENT GOVERNMENT COST ESTIMATES

## Independent Government Estimate of Cost

Direct Labor by Category	Person Days	Rate	Total
_____	_____ X	_____ =	_____
_____	_____ X	_____ =	_____
_____	_____ X	_____ =	_____
_____	_____ X	_____ =	_____
_____	_____ X	_____ =	_____
_____	_____ X	_____ =	_____
TOTAL DIRECT LABOR			_____
Direct Labor Overhead (____%)			_____
Overhead Plus Direct Labor		(1)	_____
General and Administrative Expenses			
Travel and Per Diem			_____
Consultants (____ days at \$____/day)			_____
Materials			_____
Total G&A Expenses			_____
G&A Fee (____%)			_____
G&A Expenses & Fee		(2)	_____
Subtotal (Line 1 & 2)		(3)	_____
Fixed Fee (____%)			_____
Total (Fixed Fee + Line 3)			_____
GRAND TOTAL			_____

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## **TECHNICAL EVALUATION PLANNING**

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### **PLANNING FOR THE TECHNICAL EVALUATION OF PROPOSALS**

The statement of work and the technical evaluation criteria, taken together, establish the ground rules for an acquisition. The SOW states precisely what products or services the Government is requesting, while the technical evaluation criteria clearly state the factors that will be used in evaluating the proposals and the relative importance of each technical factor. It is important to plan the technical evaluation criteria while writing the SOW because these two parts of the RFP are intimately connected.

Developing a SOW requires the project officer to identify project objectives and the actual functions required to accomplish them. Choosing and weighting the evaluation criteria requires that this process be taken one step further--the project officer must identify the characteristics or attributes that are required to perform the functions necessary to accomplish the project objectives. Because every contract is different, it is important that the project officer take the time to identify those technical attributes of an offeror that will be important in predicting whether or not the required work will be accomplished with the highest degree of quality.

### **DEVELOPING TECHNICAL EVALUATION CRITERIA**

#### **Purpose of the Criteria**

Evaluation criteria permit an objective assessment of the merits of individual proposals against standards, rather than against other proposals. Each RFP must identify the specific evaluation criteria and the relative importance of the criterion used so prospective offerors may judge the basis by which their proposals are to be evaluated, and how they may best devote their efforts in preparing their proposals. Criteria should be definable in specific qualitative terms that are readily understandable by both the offerors and the evaluators.

Development of evaluation criteria and the assignment of the relative importance or weight to each criterion require the exercise of judgment on a case -by-case basis because they must be tailored to the requirements of the individual acquisition. Because the criteria will serve as a standard against which all proposals will be evaluated, it is imperative that they be chosen carefully to emphasize those factors considered to be critical in

the selection of a contractor.

The final evaluation criteria and indications of their relative importance or weights, as included in the RFP, cannot be changed except by a formal amendment to the RFP issued by the contracting officer. No factors other than those set forth in the RFP can be used in the evaluation of proposals.

### **Selecting and Developing Technical Evaluation Criteria**

Evaluation criteria must be clear, concise, and fair so that all potential offerors are fully aware of the basis for proposal evaluation and are given an equal opportunity to compete. All evaluation criteria should have the following attributes.

Sufficient detail to provide offerors (and evaluators) with a total understanding of the factors to be used in the evaluation process.

Address the key programmatic concerns that offerors must be aware of in preparing proposals.

Be specifically applicable to the acquisition. They should not merely be restatement of criteria from previous acquisitions.

Represent only the significant areas of importance that must be emphasized, rather than a multitude of factors. (All criteria tend to lose importance if too many are included. Using too many criteria will prove as detrimental as using too few.)

Typical examples of topics that form a basis for the development of evaluation criteria are listed below. These examples are intended to help project officers develop actual evaluation criteria for a specific acquisition and should only be used if they are applicable to that acquisition.

1. Understanding of the problem and statement of work.
2. Method of accomplishing the objectives and intent of the statement of work.
3. Soundness of the scientific or technical approach for executing the requirements of the statement of work (to include, when applicable, preliminary layouts, sketches, diagrams, other graphic representations, calculations, curves, and other data necessary for presentation, substantiation, justification, or understanding of the approach).



4. Special technical factors, such as experience or pertinent novel ideas in the specific branch of science or technology involved.
5. Feasibility and/or practicality of successfully accomplishing the requirements (to include a statement and discussion of anticipated major difficulties and problem areas and recommended approaches for their resolution).
6. Availability of required special research, tests, and other equipment or facilities.
7. The managerial ability to achieve delivery or performance requirements as demonstrated by the proposed use of management and other personnel resources, and to successfully manage the project, including subcontractor and/or consultant efforts, if applicable, as evidenced by the management plan and demonstrated by previous experience.
8. Availability, qualifications, experience, education, and competence of professional, technical, and other personnel, to include proposed subcontractors and consultants (as evidenced by resumes, endorsements, and explanations of previous efforts).
9. Soundness of the proposed staff time or labor hours, propriety of personnel classifications (professional, technical, others), necessity for type and quantity of material and facilities proposed, validity of proposed subcontracting, and necessity of proposed travel.

### **Weighting Criteria**

A statement or indication of the relative importance or weight must be assigned to each evaluation criterion to inform prospective offerors (and evaluators) of the specific significance of each criterion in comparison to the other criteria. Similarly, if a criterion is subdivided into parts, each of the parts must be assigned a statement or indication of the relative importance or weight.

The two principal methods used to indicate the relative importance or weight are the numerical score and adjective description. The Department does not prescribe a single method for determining the relative importance or weight, but recommends the use of the numerical score method because it is more precise and informative.

However, in some instances the use of the adjective description method may be more appropriate and, hence, may be used when that

determination is made.

### **Cost or Price as a Criterion**

Cost or price is not generally included as one of the evaluation criteria and is not assigned an indication of relative importance or weight. However, a statement must be included in the RFP to reflect the relationship of cost or price in comparison to the other criteria. The contracting officer must ensure that this statement accurately reflects the appropriate balance between cost or price and the technical factors. The contracting officer and project officer should work together in arriving at the final determination regarding the relationship. The following are examples of statements that may be used to reflect this relationship. Because these examples represent only the two extremes and the middle position, another statement may be developed to reflect the relationship that applies to the particular acquisition.

"You are advised that paramount consideration shall be given to the evaluation of technical proposals rather than cost or price."

"You are advised that paramount consideration shall be given to cost or price rather than the evaluation of technical proposals."

"You are advised that the evaluation of technical proposals and cost or price are of approximately equal value."

### **Sample Evaluation Criteria Formats**

The two criteria factors and formats that follow are for general guidance and should be varied to suit the requirements for each individual project. The items identified may be expanded or modified to reflect technical factors considered to be critical to the specific acquisition. The specific points assigned to each criteria must be identified in the RFP and the criteria listed in their relative order of importance.

## **FORMAT 1**

### **Understanding of the Problem (40 Points)**

Provide a comprehensive statement of the problem, scope and purpose of the project to demonstrate your complete understanding of the intent and requirements. This understanding indicates a clear awareness of the contract objectives.

### **Soundness of Approach (30 Points)**

Proposal describes the proposed approach to comply with each of the requirements specified in the Statement of Work. The proposal is consistent with the stated goals and objectives. The proposed approach of ensuring the achievement of timely and acceptable performance is well documented and sound. Milestone and/or phasing charts illustrate a logical sequence of proposed events.

### **Personnel (20 Points)**

1. The staff is competent and experienced in the skills required in the Statement of Work. Resumes of staff and consultants reflect not only academic qualifications but length and variety of experience in similar tasks and clearly demonstrate relevant training and experience. If subcontractors are proposed, information is provided to support the qualifications of the subcontractors.
2. Information is provided as to which key personnel will be used on this project. Documentation is provided on the decision-making authority of the project director as related to other elements of the organization. The percentage of time each staff member will contribute to the program is adequately identified. The extent to which outside consultants or specialists will be used is documented and evidence of their availability is provided.

### **Facilities (10 Points)**

A description and location of your organization's research, test, and other facilities to be used on this project is to be provided.

Award will be made to that responsible offeror who can best perform the required work in a manner most advantageous to the Government, considering cost and all of the above factors.

## FORMAT 2

### Technical Approach

**Total: 40 Points**

1. Understanding and awareness of tasks required including the quality of approaches offered for dealing with these tasks. **8 points**
2. Data collection techniques which are practical, sound and timely and which reflect both an awareness of potential methodological and inferential problems and proposed solutions for resolving them. **8 points**
3. An administrative framework satisfactory for maintaining quality control over the implementation and operations of the study. **8 points**
4. Data handling and analysis techniques are relevant and sound. **8 points**
5. An overall approach which reflects clarity, conciseness, general responsiveness, and the ability to comply with the requirements of the Statement of Work. **8 points**

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## ORAL PRESENTATIONS or ORAL PROPOSALS

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The use of oral presentations as a substitute for a portion of the traditional written proposal in competitive negotiated procurements, is gaining increased interest at HHS. This concept is viewed as a method of streamlining the proposal evaluation and source selection process. Procurement and program staff who have tried this approach have found it to be an exciting and effective way of doing business.

The purpose of using oral presentations is to reduce or eliminate the need for written material where information can be conveyed in a more meaningful and efficient way through verbal means. It's major use has been to permit evaluators to receive information regarding the offeror's ability to perform the work directly from the key members of the offeror's team who will actually perform the work. In many cases, the evaluators conduct the oral presentation in interview form, posing sample tasks, probing for additional information or using other techniques to determine the ability of the offeror.

The advantage of using oral presentations includes the reduction of time and cost in the source selection process. The process can also reduce the offeror's costs and increase competition. In addition, the "face to face" interaction improves communication and enhances the exchange of information between the Government and the offerors. Oral presentation provides a more level playing field for those offerors with expertise to satisfy the Government's requirement, but less experience in preparing written Government proposals. This method can also help the Government determine which offerors truly possess the capability to perform versus those offerors who have the resources of great proposal writers, but less ability to produce the actual work. All the advantages of the oral presentation method mentioned work together to improve the ability of the Government to select the most advantageous offer.

Oral presentations are most useful in situations where the Government's Statement of Work is clear and not overly complex in nature. Oral presentations are also useful in requirements where the offeror's qualifications and demonstrated understanding of the work serve as the prime evaluation criteria.

In terms of application, agencies are free to design an approach that best fits the nature of the procurement and available resources. Variations in approach have included:

- Media used to record the presentation
- Restrictions on the extent and nature of material used in the presentation

- Type, number and background of Government participants
- Type, number and background of Offeror's presentation team
- Amount of time permitted for the presentation

In all instances, the RFP must notify offerors that oral presentations will be used to evaluate and select the contractor and explicit instructions must be included regarding the extent and nature of the approach. Setting a firm time limit ensures that each offeror has an equal amount of time, and, controls the amount of material used during the presentation. All of the Government evaluators who are responsible for evaluating the offers for a specific requirement should be present at each oral presentation. Further, requiring the presenters to be the same individuals who will perform or direct the work will avoid use of "professional" presenters. Rejecting submission of video tapes or other types of media during the presentation will also ensure that presentations are made in person and are representative of the offeror's true capabilities.

Evaluations can be performed after all the presentations are held or after each individual presentation. There is no firm rule; however there are benefits to promptly evaluating each presentation while the information is still fresh and the evaluation team is still assemble. In conclusion, the use of oral presentations appears to be an effective method of streamlining source selection and enhancing the ability of the Government to discern the most advantageous offer. Based upon an examination of procurement statues and regulations, and GAO and court cases, there are no legal impediments to the use of oral presentations. Used appropriately, it is a proven alternative to the costly and time consuming method of written proposals. If you are interested in pursuing this method for one of your requirements, contact your contracting officer early in the acquisition process to obtain more information and specific guidance geared to your acquisition.

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## **SOURCES FOR SOLICITATION**

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### **DEVELOPING A SOURCE LIST**

Within a particular field of interest, a project officer becomes familiar with many potential sources and acquires knowledge of each source's technical capability, physical resources, experiences in a given area, and performance history. The project officer should use this knowledge in developing a recommended source list. The project officer also should review appropriate business and scientific journals to identify new sources, in addition to those the contracting officer will obtain from advertising in the

Commerce Business Daily . It is Government policy that contracting officers must publicize contracting actions in order to:

Increase competition;

Broaden industry participation in meeting Government requirements; and

Assist small business concerns, small disadvantaged business concerns, and labor surplus area concerns in obtaining contracts and subcontracts.

#### **REQUIREMENTS FOR ACQUISITION NOTICES AND SYNOPSSES**

The Department's policy is that the following proposed acquisitions must be publicized in the Commerce Business Daily at least 15 calendar days before issuance of the solicitation.

Solicitations for property or services expected to exceed \$25,000;

Orders expected to exceed \$25,000 to be placed under a basic agreement, basic ordering agreement, or similar agreement; and

Awards of contracts for property or services expected to exceed \$25,000 if there is likely to be a subcontract.

The only time it is permissible to deviate from this requirement is when the contracting officer has determined that an urgent delivery or performance requirement exists and that the 15 -calendar-day period between notification of the availability and issuance of the solicitation would be detrimental to the successful completion of the acquisition. In this instance, the contracting officer must ensure that the synopsis is forwarded to the Commerce Business Daily to arrive not later than the date of issuance of the solicitation. The contracting officer must honor telephone requests for copies of the solicitation and include a statement to this effect in the synopsis forwarded for publication in the Commerce Business Daily .

Potential offerors or bidders must be allowed a reasonable period of time in which to request and receive a solicitation and to prepare and submit a response to that solicitation. The deadline for submission of proposals and bids may not be less than 30 calendar days after the solicitation has been publicized in the Commerce Business Daily . R&D solicitations require a minimum of 45 days. The minimum period is applicable to all sealed bid and negotiated acquisitions expected to exceed \$25,000, and for noncompetitive small purchases expected to exceed \$10,000. A reasonable number of copies of the solicitation must be maintained

to fulfill all anticipated requests during the 30 or 45 -day period.

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## ACQUISITION THROUGH OTHER THAN FULL AND OPEN COMPETITION

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### CIRCUMSTANCES ALLOWING LESS THAN FULL AND OPEN COMPETITION

Acquisitions may be made through other than full and open competition in the following circumstances:

There is only one responsible source . For example, follow-on contracts for the continuation of major research and development studies on long -term social and health programs, major research studies, or clinical trials may be deemed to be available only from the original source when it is likely that award to any other source would result in unacceptable delays in filling the requirements of the Department or the OPDIV.

When the OPDIV head has determined that a specified item of technical equipment or parts must be obtained to meet an activity's program responsibility to test and evaluate certain kinds and types of products, and only one source is available . (This criterion is limited to testing and evaluation purposes only and may not be used for initial outfitting or repetitive acquisitions. Project officers should support the use of this criterion with citations from their agency's legislation and the technical rationale for the item of equipment required.)

When the OPDIV head has determined that there is existing equipment that, for reasons of compatibility and interchangeability, requires an item that is manufactured only by one source . This criterion is for use in acquisitions where a particular brand name item is required, and an "or equal" will not meet the Government's requirements. This criterion may not be used when there are other manufacturers available that may be able to produce acceptable items, even though their products might require some adjustments and modifications. The other manufacturers must be given the opportunity to compete.



Each procuring activity within HHS has appointed a Competition Advocate who is responsible for promoting full and open competition and challenging barriers to competition.

#### **JUSTIFICATIONS AND APPROVALS REQUIRED**

The program office should discuss prospective "other than full and open competition" requests with their supporting contracting office as early as possible during the acquisition planning stage (see FAR Part 7.1 and HHSAR Subpart 307.1), and before submitting the requisition or request for contract. The discussions may resolve uncertainties, provide program offices with names of other sources, allow proper scheduling of the acquisition, and avoid delays that might otherwise occur should it be determined that the request for other than full and open competition is not justified.

When a program office desires to obtain certain goods or services by contract without full and open competition, it shall, at the time of forwarding the requisition or request for contract, furnish the contracting office with a justification explaining why full and open competition is not feasible. All justifications shall be initially reviewed by the contracting officer.

Justifications in excess of \$10,000 shall be in the form of a separate, self-contained document, prepared in accordance with HHSAR Subpart 315.7105 and called a "JOFOC" (Justification for Other than Full and Open Competition). Justifications of \$10,000 or less may be in the form of a paragraph or paragraphs contained in the requisition or request for contract.

The JOFOC shall be approved in writing:

For a proposed contract not exceeding \$100,000, at a level above the contracting officer.

For a proposed contract over \$100,000 but not exceeding \$1,000,000, by the competition advocate for the procuring activity designated pursuant to FAR Part 6.501. This authority is not delegable.

For a proposed contract over \$1,000,000 but not exceeding \$10,000,000, by the head of the procuring agency, or a designee who is serving in a position in grade 16 or above under the General Schedule (or in a comparable or higher position under another schedule).

For a proposed contract over \$10,000,000, by the senior procurement executive of the agency designated pursuant to the OFPP Act (41 U.S.C. 414(3)) in accordance with agency procedures. This authority is not delegable.

Justifications, whether over or under \$10,000, must fully describe what is to be acquired, offer reasons that go beyond inconvenience, and explain why it is not feasible to obtain competition. The justifications must be supported by verifiable facts rather than mere opinions. Documentation in the justification should be sufficient to permit an individual with technical competence in the area to follow the rationale.

Justifications must contain sufficient facts and rationale to justify the use of the specific authority cited. As a minimum, each justification shall include the following information:

Identification of the agency and the contracting activity and specific identification of the document as a "justification for other than full and open competition."

Nature and description of the action being approved.

Description of the supplies or services required to meet the agency's needs (including the estimated value).

Identification of the statutory authority permitting other than full and open competition.

Demonstration that the proposed contractor's unique qualifications or the nature of the acquisition requires use of the authority cited.

Description of efforts made to ensure that offers are solicited from as many potential sources as is practicable.

Determination by the contracting officer that the anticipated cost to the government will be fair and reasonable.

Description of the market survey conducted and the results, or a statement of the reasons a market survey was not conducted.

Any other facts supporting the use of other than full and open competition, such as an explanation of why technical data packages, specifications, engineering descriptions, statements of work, or purchase descriptions suitable for full and open competition have not been developed or are not available.

A list of the sources, if any, that expressed an interest in the acquisition in writing.

A statement of the actions, if any, the Department may take to remove or overcome any barriers to competition

before any subsequent acquisition for the supplies or services required.

Contracting officer certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.

The following signature lines:

Recommended _____	Date _____
Project Officer	
Concur _____	Date _____
Project Officer's	
Immediate Supervisor	
Concur _____	Date _____
Contracting Officer	
Approved _____	Date _____
Approving Official	

The contracting officer who receives a JOFOC for processing, after ascertaining that the document is complete, must request advice from pricing, audit, legal, and other appropriate staff offices, and forward the JOFOC, with his or her concurrence or nonconcurrence, to the appropriate approving official. When the contracting officer does not concur with the JOFOC, a written explanation setting forth the reasons must be provided the approving official. If the JOFOC is disapproved by the approving official, the contracting officer must promptly notify the concerned program office.

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## UNSOLICITED PROPOSALS

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An unsolicited proposal is one that is submitted without prior solicitation from the Government. An unsolicited proposal must meet each of the following criteria:

It must be a written offer to perform research or development work (including feasibility studies and demonstrations).

It must have been submitted to the Government solely on the offeror's own initiative, and without prior formal or informal solicitation.

It must be an original effort by the offeror in the form of new ideas, which are unique, and because of the offeror's proposal development efforts, a sole source

procurement is warranted.

Any unsolicited proposals received by any organizational element should be forwarded immediately to the Contracting Office. The Contracting Office will acknowledge the receipt of all unsolicited proposals and assign an appropriate control number to the proposal.

In the acknowledgement letter, the contracting officer will request any additional information that is required in order to make the proposal complete. The contracting office will then forward the unsolicited proposal to the appropriate program office for preliminary review.

#### **CONTENTS OF UNSOLICITED PROPOSALS**

The following information, at a minimum, must be provided as part of all unsolicited applications:

An unsolicited proposal certification that provides either of the following statements, as appropriate:

This is to certify that, to the best of my knowledge and belief, this proposal or the subject matter or general concepts of this proposal have not been discussed with any employee of the Department of Health and Human Services.

This is to certify that, to the best of my knowledge and belief, this proposal or the subject matter or general concepts of this proposal have been discussed with the following employees of the Department of Health and Human Services (provide name, title, organization and address of each employee).

Name and address of the organization or individual submitting the proposal;

Date of preparation or submission;

Type of organization (profit, nonprofit, educational, other);

Clear and concise title and abstract of the proposal;

An outline and discussion of the purpose of the proposed effort or activity, the methodology to be used, and the nature and extent of the anticipated results;

Names of the key personnel to be involved (name of principal investigator, if applicable), brief biographical information, including principal publication

and relevant experience;

Proposed starting and completion dates;

Equipment, facility, and personnel requirements;

Proposed budget, including separate cost estimates for salaries and wages, equipment, expendable supplies, services, travel, subcontracts, other direct costs and overhead;

Names of any other Federal agencies receiving the unsolicited proposal and/or funding the proposed effort or activity;

Brief description of the offeror's facilities, particularly those that would be used in the proposed effort or activity;

Brief outline of the offeror's previous work and experience in the field;

A current financial statement and, if available, a descriptive brochure;

Period for which the proposal is valid;

Names and telephone numbers of offeror's primary business and technical personnel who the agency may contact during evaluation and/or negotiation;

Identification of technical data that the offeror intends to be used by the Department for evaluation purposes only; and

Signature of a responsible official of the proposing organization or a person authorized to contractually obligate the organization.

## Review

The Contracting Officer will act to conduct a preliminary review of the proposal to determine that it:

Will deliver goods or services that meet the needs of the program office;

Contains sufficient technical and cost information to enable a meaningful evaluation; and

Does not offer to perform standard services, such as routine analyses or testing in accordance with established procedures, or to provide "off -the-shelf" articles.

In addition, the reviewing program official must make a written determination as to whether the document is truly unsolicited. In making such a determination, consideration should be given to all relevant circumstances, including whether the document may have resulted from: (1) close professional relationships between program representatives and their counterparts in the scientific community; or (2) the inadvertent disclosure by program personnel of information relating to specific projects being contemplated.

The cognizant program office official must provide the results of the review in writing to the contracting officer. If this review results in the finding that the proposal is unacceptable, the contracting officer will immediately notify the offeror, provide the reasons why the proposal is unacceptable, and return the proposal to the contractor.

If the program office decides to fund the unsolicited proposal, it must prepare a "Justification for Acceptance of Unsolicited Proposal." This justification must document:

That the substance of the proposal is not available to HHS without restriction from another source, or competition is otherwise precluded; and either

that the acquisition is for basic scientific or engineering research; and the unsolicited proposal was selected on the basis of its overall merit, cost and contribution to the program's objectives, after a thorough evaluation and comparison with other proposals, solicited or unsolicited, in the same or related fields; or

that the acquisition is for services other than basic research (e.g., development, feasibility studies, etc.); the unsolicited proposal contains

technical data or offers unique capabilities that are not available from another source and it is not feasible or practical to define the Government's requirement in such a way as to avoid the necessity of using the technical data contained in the unsolicited proposal.

Justification for acceptance of an unsolicited proposal should be submitted to the Contracting Officer together with, but as a separate document from, the RFC and shall be signed by the same program office who signs the RFC. These justifications must be reviewed and approved as follows:

Up to \$10,000	Contracting Officer
\$10,001 to \$99,999	Principal Office responsible for acquisition after recommendation from Contracting Officer.
\$100,000 and over	Noncompetitive Review Board, or the Principal OPDIV after recommendation from Contracting Officer.

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#### **SPECIAL SOCIOECONOMIC ACQUISITIONS PROGRAMS**

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An important governmental policy is to place a fair proportion of its acquisitions with small business concerns, small and disadvantaged business concerns, and business concerns located in labor surplus areas. It is Government policy to ensure that such concerns also shall have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance.

Within HHS, the functional management responsibilities for the Department's small business, disadvantaged business, and labor surplus area program are delegated to the Director of the Office of Small and Disadvantaged Business Utilization (OSDBU) in the Office of the Secretary. Each OPDIV has appointed a small and disadvantaged business utilization specialist (SADBUS) who is responsible for ensuring that the Small Business and Small Disadvantaged Business Utilization programs are implemented within their OPDIVs. They locate capable small business, disadvantaged businesses, and labor surplus area business sources for current and future acquisitions.

They also must ensure that contracting and technical staff are knowledge able about these program requirements and that they take all reasonable action to increase small business participation in their contracting processes.

The SADBUS must review each proposed acquisition prior to the contracting officer's review to determine the feasibility of recommending award to SBA pursuant to section 8(a) of the Small Business Act. When a contract is not appropriate for 8(a) award, the SADBUS must then review the proposed acquisition to determine if it can be recommended as a total or partial set -aside for small business concerns or as a labor surplus set -aside of any kind.

Although the primary responsibility for implementing these policies rests with the contracting office, project officers should be knowledgeable about these programs and should take steps to include these businesses in their acquisitions. They are listed and defined below:

**Small business concern.** A concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria established by the Small Business Administration.

**Small disadvantaged business concern.** A small business concern that (a) is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock owned by one or more such individuals, and (b) has its management and daily business controlled by one or more such individuals.

**Labor surplus area concerns.** A concern that together with its first -tier subcontractors will perform substantially in labor surplus areas. Performance is substantially in a labor surplus area if the costs incurred under the contract on account of manufacturing, production, or performance of appropriate services in labor surplus areas exceed 50 percent of the contract price. A labor surplus area is defined by the Department of Labor as an area of concentrated unemployment or underemployment or an area of labor surplus.



**Woman-owned business concerns.** A small business that is at least 51 percent owned by a women or women who are U.S. citizens and who also operate the business.

## **SECTION IV - SOLICITATION AND AWARD**

The Federal government uses different methods and approaches to acquire goods and services. These acquisition methods and approaches, their differences and similarities, are discussed in Section II of this Handbook.

Contracting by negotiation is the most commonly used approach in the Department. It is also the most complex and places the most demands on the project officer. In this contracting approach, the Government communicates its requirements to the business community by means of a solicitation document known as a Request for Proposal (RFP). In addition to the statement of work (SOW), discussed in detail in the previous section, this document contains various representations and/or certifications to be completed by prospective contractors, as well as the proposed terms and conditions of the resulting contract. Also included are instructions to offerors to guide them in preparing their proposals, and information telling offerors how the Government will evaluate proposals to determine which offer will be selected for contract award.

The primary responsibility shifts to the contracting officer during most aspects of the solicitation and award phase of an acquisition.

The project officer primarily plays a supporting role at this stage. This section gives a detailed outline of the project during solicitation and award.

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### **THE REQUEST FOR PROPOSAL (RFP)**

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The purpose of the RFP is to convey information that prospective offerors need to prepare a proposal. It describes all the information that prospective offerors must furnish to permit a meaningful and equitable evaluation of their offers. The RFP must be clear, complete, accurate, and consistent with the requirements of the acquisition so that it provides all who receive it with the same understanding of the requirements.

The contracting officer is responsible for preparing the RFP with the assistance of the project officer. However, much of the information in the RFP is derived directly from the Request for Contract (RFC) or is otherwise furnished by the project officer. As a rule, the contracting officer does not have the technical knowledge to uncover or correct any substantive deficiencies that

may exist in the technical data. Therefore, the project officer must take care to develop an RFC and supporting documentation during the pre-solicitation phase that will fully satisfy program needs and objectives when included in the RFP. The project officer should review the final RFP before it is printed and released.

The HHSAR Subpart 315.406 states that the purpose of an RFP is to convey information that prospective offerors need to prepare a proposal. The RFP includes the SOW, and the terms, conditions, and provisions that will form the basis for the final definitive contract.

Clear distinctions must be made as to the contents and purpose of the SOW, the instructions to offerors, and the evaluation criteria. The RFP should meet the following objectives:

The statement of work must clearly specify the work to be done by the contractor (or, if it is an R&D acquisition, presents a clear statement of the requirements; see FAR Part 35);

The general, technical, and business instructions must delineate all the essential information prospective offerors need to prepare their proposals (see HHSAR 315.406-5(b)).

Evaluation criteria must clearly indicate the technical, management, personnel, and cost or pricing factors that will be the major considerations in selecting the successful offeror (see HHSAR 315.406-5(c)).

The RFP must require that proposals be submitted in two parts--a "technical proposal" and a "business proposal." Each part is to be separate and complete in itself so that one may be evaluated independently of the other.

The technical and business proposal instructions must provide all the information deemed essential for proper evaluation of the proposals so that all prospective offerors are aware of all requirements, and so that differences in proposals will reflect each offeror's individual approach to the requirements, not different interpretations of the requirements.

The RFP must inform prospective offerors of all evaluation criteria and of the relative importance or weight attached to each criterion. Evaluation criteria must be described sufficiently enough in the RFP to inform prospective offerors of the significant matters that should be addressed in the proposals. Only the evaluation criteria set forth in the RFP can be used in evaluating proposals; these criteria can only be modified by a formal amendment to the RFP.

Generally, the RFP will provide that the technical proposal omit any reference to cost. However, resource information, such as data concerning labor hours and categories, materials, subcontracts, travel, computer time, etc., must be included in the technical proposal so that the offeror's understanding of the scope of work may be evaluated.

## **UNIFORM CONTRACT FORMAT**

The Federal Acquisition Regulation (FAR) requires contracting officers to use the uniform contract format outlined in Table IV -1 in preparing both RFPs and contracts. This format not only makes it easier for the Government to prepare RFPs and contracts, it also makes it easier for offerors and contractors to use these documents.

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## **PRE-PROPOSAL CONFERENCES**

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The contracting officer and the project officer may decide that a pre-proposal conference is in the Government's interest. Whenever possible, notice of such a conference should be included in the RFP. If the decision is made after the RFP is issued, all recipients must be provided adequate notice of the time, date, location, purpose, and scope of the conference, and invited to submit questions in advance for inclusion on the agenda. The pre-proposal conference may be used to:

- Clarify complicated work statements;

- Disseminate background data that offer further insight into the size and complexity of the acquisition, as well as the risks of undertaking the project;

- Discuss anticipated difficulties during contract administration, including any exceptional demands on a prospective contractor's capacity and capability;

- Disclose any ambiguities, errors, or omissions in the RFP that may later be corrected in a written amendment; and

- Provide any additional information that is better presented at a conference or that may not have been known at the time the RFP was issued.

The pre-proposal conference is conducted by the contracting officer, with the project officer in attendance to provide support.

The contracting officer is responsible for determining the agenda and ensuring that a record of conference proceedings is prepared for distribution to all recipients of the RFP, whether or not they attend the conference.

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## **AMENDING THE SOLICITATION**

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It may be necessary to amend the RFP during the solicitation period. This circumstance could occur for a variety of reasons--for example, material changes are made in the specifications, terms, or conditions contained in the original solicitation; or quantities are increased or decreased. Amendments to solicitations increase administrative effort and costs, and they may delay contract award and performance. For these reasons, they should be held to a minimum through careful acquisition planning. When an amendment is unavoidable, contracting personnel prepare and distribute it to all recipients of the RFP. Any amendment to an RFP must provide a reasonable time for potential offerors to respond to the change.

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## **RECEIPT AND MANAGEMENT OF PROPOSALS**

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Proposals received under a competitive procurement may be accepted only by the contracting officer. Their receipt should be recorded by time and date and they should be properly safeguarded by the contracting officer until the deadline for submission has passed.

No proposal received after the time and date specified in the RFP may be accepted unless it is received before an award is made and was:

- Sent by registered or certified mail not later than the fifth calendar day before the date specified for receipt of offerors; or

- Sent by mail and it is determined by the contracting officer that late receipt was solely the fault of the Government; or

- The only proposal received.

One of the most important administrative responsibilities of

project and contract personnel during the pre -award period is to maintain the confidentiality of the proposals received. Unless offerors are assured that their data will not leak out to their competitors, they may be unwilling to provide the Government with technical data and other essential information about their operations. However, care must be taken when considering the use or disclosure of technical data to ensure that HHS has sufficient rights to use the data in the desired manner. To preclude the improper use or disclosure of the offerors' data, program personnel should familiarize themselves with HHS policy as described in HHSAR Subpart 315.413. The receipt, storage, and handling of proposals must be treated with all the safeguards necessary to prevent offerors from receiving information that might give them a competitive advantage.

In addition, project personnel must not reveal any information related to the identity of potential contractors, information concerning any proposal, or the status of any proposal in relation to others. Release of such information could jeopardize any resultant award and subject the persons involved to disciplinary action.

After the closing date, the contracting officer will use a transmittal memorandum to forward the technical proposals to the project officer or review panel chairperson for evaluation and to establish a date for receipt of the technical evaluation report. The contracting officer will retain the business proposals until the technical evaluation report is completed.

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## **COMMUNICATION WITH OFFERORS**

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To ensure that the competition is fair and equitable, every firm must be provided with the same information. Under no circumstances may any Government employee take any action that might give one firm an advantage over another.

In the interval between the time the RFPs are mailed and the contract is awarded, only authorized procurement personnel should have any contact with the offerors. The RFP gives the name of the contracting officer and states that only he/she represents the Government. All correspondence to prospective contractors (relating to this acquisition) must be signed by the contracting officer or the authorized representative, and all correspondence from prospective contractors (relating to this acquisition) must be received by the contracting officer.

If, for any reason, one offeror is given information that goes

beyond what is contained in the RFP, the same information must be given to all other organizations responding to the solicitation. This must be done by means of a formal amendment that corrects, clarifies, or changes RFP requirements.

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## **REVIEW OF TECHNICAL PROPOSALS**

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The Department's policy is to select contractors on the basis of a competitive, objective review, and to document source selections thoroughly. This review is performed by a technical evaluation panel convened by the program office funding the procurement.

### **TECHNICAL EVALUATION PANELS**

The technical evaluation panel reviews all proposals submitted in response to an RFP to determine which are technically acceptable. A technical evaluation panel is required for all acquisitions that are expected to exceed \$250,000. The contracting officer may require a technical evaluation panel for acquisitions that do not exceed \$250,000, depending on their complexity.

The technical evaluation panel is responsible for evaluating the original proposals; making recommendations to the chairperson regarding clarifications and deficiencies; reviewing supplemental, revised, and/or "best and final" offers; and, if required, assisting the contracting officer during discussions and negotiations.

To the extent possible, the same evaluators should be available throughout the entire evaluation and selection process to ensure continuity and consistency in the treatment of proposals. However, it is not always necessary for the technical evaluation panel to evaluate revised proposals. The chairperson, with the concurrence of the contracting officer, may decide not to have the panel evaluate the revised proposals. This decision must be fully documented by the chairperson and approved by the contracting officer. The following circumstances are examples of instances when the panel need not review revised proposals:

The answers to the questions do not have a substantial impact on the proposal (see HHSAR Subpart 315.609( i));

The "best and final" offers are not materially different from the original proposals; or

The rankings of the offerors are not affected because the revisions to the proposals are relatively minor.

Attendance by the evaluators is mandatory when the contracting officer considers the technical evaluation panel meeting to be necessary. When the chairperson determines that an evaluator's failure to attend the meetings is prejudicial to the evaluation, the chairperson may replace the individual after discussing the situation with the contracting officer and obtaining both his/her concurrence and the approval of the program official responsible for appointing the panel members. Whenever continuity of the evaluation process is not possible, and either new evaluators are selected or a reduced panel is used, each proposal being reviewed at that stage of the acquisition should be reviewed by all members of the revised panel unless this is impractical because of the receipt of an unusually large number of proposals.

The technical evaluation panel should be composed of Government employees. Outside evaluators may be used when expertise is required that is not available within the Government, or as required by law. The National Institutes of Health (NIH) is required to have a peer review of research and development projects in accordance with Public Law 93 -352 as amended by P.L. 94-63; 42 U.S.C. 298 I-4. This legislation states that not more than one-fourth of the members of a peer review group may be officers or employees of the Federal government.

Business proposals are evaluated after the contracting officer has accepted the technical evaluation. Evaluations of business proposals are conducted only for those proposals that are in the competitive range. Although the panel's primary responsibility is to evaluate technical proposals, it also may be asked to comment on some aspects of the business proposal. Generally, these will be limited to quantitative elements of cost, such as the number of hours of a given skill required to accomplish a task, the amount and destinations for travel, etc. These cost elements will also help the technical evaluation panel judge an offeror's understanding of the requirement.

#### **ROLE OF THE PROJECT OFFICER**

As the contracting officer's technical representative for the acquisition, the project officer's responsibility is to recommend panel members who are knowledgeable about the technical aspects of the acquisition, and who are competent to identify the strengths and weaknesses of the various proposals. At least 50 percent of the program personnel appointed to a technical evaluation panel for any competitive solicitation must have successfully completed the basic project officer training course



or its equivalent. This requirement applies to the initial technical proposal evaluation, as well as to any subsequent technical evaluations that may be required.

If a panel member has an apparent or real conflict of interest related to a proposal being evaluated, that member must be replaced with another evaluator. If a suitable replacement is not available, the panel must perform the review with one less evaluator.

The project officer should submit the recommended list of panel members to an official within the program office in a position at least one level above the project officer, or in accordance with contracting activity procedures. This official reviews the recommendations, appoints the panel members, and selects the chairperson.

## **READING AND SCORING PROPOSALS**

Normally the technical evaluation panel convenes to evaluate the proposals, unless the contracting officer decides this is not feasible or practicable.

When a panel convenes, the chairperson is responsible for keeping track of all copies of the technical proposals provided by the contracting officer. The chairperson generally distributes the technical proposals at the initial panel meeting and establishes procedures for securing the proposals whenever they are not being evaluated. After the evaluation is complete, all proposals must be accounted for by returning them to the contracting officer, destroying them, or filing them in a way that will maintain their confidential nature.

The contracting officer should address the initial meeting of the panel and state the basic evaluation ground rules. The contracting officer should provide written guidance to the panel if he/she is unable to attend the initial meeting. The guidance should include:

- An explanation of conflicts of interest;

- The necessity of reading and understanding the solicitation, especially the statement of work and evaluation criteria, before reading the proposals;

- The need for evaluators to restrict the review only to the solicitation and the contents of the technical proposals;

- The need for each evaluator to review all the proposals;

- The need to watch for ambiguities, inconsistencies,

errors, and deficiencies that should be noted;

An explanation of the evaluation process and what will be expected of the evaluators;

The need for the evaluators to be aware of the requirement to have complete written documentation of the individual strengths and weaknesses that affect the scoring of the proposals; and

An instruction directing the evaluators that, until the award is made, information concerning the acquisition must not be disclosed to any person not directly involved in the evaluation process.

Every evaluator should read each proposal, describe strengths and weaknesses, and develop preliminary scores in relation to each evaluation criterion set forth in the solicitation. The evaluators use either the rating sheets in the technical evaluation plan (discussed below) or rating sheets approved by the contracting officer when a technical evaluation plan is not required.

Each evaluator individually scores each proposal, judging the merits of each against the evaluation criteria published in the RFP. No factors other than those set forth in the RFP may be used.

After individual review, the evaluators should discuss in detail the strengths and weaknesses described by each evaluator. Evaluators may change their numerical scores at this time if they believe they have gained a new understanding of the requirements and the proposed approach, but they should not feel pressured to make changes to conform to the group if they do not wish to do so.

The panel collectively ranks the proposals. Generally, this is done by totaling the numerical scores assigned to the criteria by each evaluator, and developing an average rating for each offeror.

Other methods are permissible, depending on the rating plan employed. In any case, numerical scores must be accompanied by a supporting narrative that discusses what was considered in the scoring.

When the proposals have been ranked, the evaluators should then identify each as either acceptable or unacceptable. A proposal may be rated as technically unacceptable if it does not meet a design or performance requirement, or if it deviates from the criteria set forth in the RFP. Predetermined cutoff scores cannot be used.

## **THE TECHNICAL EVALUATION REPORT**

A technical evaluation report must be prepared and signed by all voting panel members for submission to the contracting officer. The report is maintained as a permanent record in the contract file. The report should reflect the ranking of proposals and identify each proposal as acceptable or unacceptable. The report must also include a narrative evaluation specifying the strengths and weaknesses of each proposal, a copy of the rating sheet and any reservations, qualifications, or areas to be addressed that might affect the selection of sources for negotiation and award.

The report also should include specific points and questions that are to be raised in discussions or negotiations. A determination of technical unacceptability must be supported with concrete technical data. The use of phrases such as "it could not be determined" and "sketchy presentation" is not adequate support for unacceptable ratings. The narrative forms the basis for later debriefings; therefore, specific references and terms must be used.

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## **REVIEW OF BUSINESS/COST PROPOSALS**

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The contracting officer is responsible for evaluating business considerations, i.e., those factors relating to cost/price analysis and determination of contractor's responsibility (e.g., adequate financial resources, ability to comply with delivery or performance schedule, satisfactory record of performance, etc.). Business evaluations normally center around cost analysis and analysis of contractor's financial strength and management capability.

Each business proposal requires some form of price or cost analysis. The contracting officer must exercise judgment in determining the extent of analysis in each case. The record must be carefully documented to disclose the extent to which the various elements of cost, fixed fee, or profit contained in the contractor's proposal were analyzed. Elements considered in cost analysis generally include direct material and labor costs, subcontracting costs, overhead rates, general and administrative expenses, travel costs, and profit or fee. Elements considered in evaluating contractor's financial strength and management capability include organization, past performance on similar contractual efforts, reputation for reliability, availability of required facilities and personnel, cost controls, accounting policies and procedures, purchasing procedures, personnel practices (Equal Employment Opportunity, etc.), property accounting and control, and financial resources. In addition, adequacy of the contractor's facilities and key personnel critical to contract

performance should be evaluated.

The project officer and/or the technical evaluation panel should analyze such items as:

- The number of labor hours proposed for various labor categories;

- The mix of labor hours and categories of labor in relation to the technical requirements of the project;

- The types, numbers, and hours/days of proposed consultants;

- The logic of proposed subcontracting;

- The proposed travel, including number of trips, locations, purpose, and travelers.

- The type and quantity of data processing.

The project officer and/or the evaluation panel should tell the contracting officer whether these elements are necessary and reasonable for efficient contract performance. Exceptions to proposed elements should be supported in sufficient detail to allow the contracting officer to negotiate effectively.

In addition, the contracting officer may request that the technical evaluation panel review cost or pricing data as a means of facilitating the decision about including a proposal in the competitive range. Situations that may make such a review necessary include:

- A suspected "buy -in" (i.e., a deliberately low bid made with the expectation that the resulting loss will be made up in modifications to the contract or in future contracts);

- Large difference in cost or price among the proposals;

- Proposals receiving a high technical rating that have relatively high costs; and

- Proposals receiving low technical rating that have relatively low costs.

The comparison of cost data with technical factors and information about whether prices are realistic should help the contracting officer decide which proposals to include in the competitive range.

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## DETERMINING THE COMPETITIVE RANGE

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The FAR requires that written or oral discussion be conducted with all responsible offerors who submit proposals judged to be within the competitive range, considering price and other factors. A proposal must be included in the competitive range unless there is no real possibility that it can be improved to the point where it becomes the **most** acceptable. This provision is designed to save both the Government and potential contractors the time and expense of participating in negotiations, and revising, preparing, submitting, and evaluating final proposals in cases where the offeror's initial proposal is such that there is clearly no possibility of that offeror being selected for contract award.

The contracting officer is responsible for determining the competitive range, although the results of the technical evaluation will weigh heavily in making this determination. All determinations regarding whether to include a proposal in the competitive range must be completely documented, including the salient reasons for the determinations.

Some of the factors that the contracting officer should consider in determining the competitive range are:

- The relative importance of cost, compared to technical factors;

- The possibility of significantly reducing the cost of a proposal with an unreasonably high price without undermining the technical merit, if the offeror otherwise has a reasonable chance to receive an award; and

- The likelihood of reducing the cost or price of a proposal that exceeds the Government's requirements.

The competitive range must be determined on the basis of the array of scores or relative ranking of the offerors, but not on the basis of a predetermined passing score. Borderline proposals must not be excluded from consideration automatically if there is a reasonable chance that clarification or discussion will make them acceptable.

No offeror may be eliminated from the competitive range solely because of an offer to deliver services or supplies of a higher quality than required. If there is no substantial basis for distinguishing between the technical excellence of proposals meeting the Government's requirements, cost or price analysis

should then become the controlling factor.

The contracting officer and project officer should discuss uncertainties and/or deficiencies that are included in the technical evaluation report for each proposal in the competitive range. Technical questions should be developed by the project officer and/or the technical evaluation panel and should be included in the technical evaluation report. The management and cost or price questions should be prepared by the contracting officer with assistance from the project officer and/or panel, as required.

The method of requesting offerors in the competitive range to submit the additional information will vary depending on the complexity of the questions, the extent of additional information requested, the time needed to analyze the responses, and the schedule for making the award. However, to the extent practicable, all questions and answers should be in writing. Each offeror in the competitive range must be given an equitable period of time to prepare responses to questions, to the extent practicable.

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## **NEGOTIATIONS**

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Developing the Government's negotiating goals is a process that will continue to require close coordination among the contracting officer, the project officer, and in many cases the evaluation panel. Although the contracting officer is responsible for developing the Government's objectives and the strategy for meeting those objectives, this usually requires the cooperation of the other members of the Government team.

Often the contracting officer will hold a pre -negotiation meeting to discuss negotiation goals and strategy and to develop a unified negotiating position. In establishing a negotiating strategy, the contracting officer and the project officer determine:

- The subjects to be discussed;

- The content and presentation of revised positions;

- Requirements for support of positions; and

- All other tactical procedures for reaching agreement.

## **WRITTEN AND ORAL DISCUSSION**

Either written or oral negotiations must be conducted with each offeror whose proposal is within the competitive range. In some cases, the contracting officer will represent the Government in negotiating with offerors; in other cases there will be a negotiating team composed of those individuals with skills and backgrounds appropriate for the specific acquisition. In either case, the contracting officer is the focal point and controls the negotiations, with the other members present in an advisory capacity. The contracting officer may elect to have various members of the team lead the negotiations in particular areas. However, the contracting officer should always be in control of the overall negotiations.

Negotiations are carried on separately with each offeror in the competitive range. The goal is to achieve a contract agreement. There should be no reference in discussion with any offeror to the proposal of any other offeror. In fact, no offeror should even be told whether there are any other offerors.

The contracting officer points out to each offeror the ambiguities, uncertainties, and deficiencies, if any, in its proposal. Each offeror is then given a reasonable opportunity to support, clarify, correct, improve, or revise its proposal. No offeror may be given information that will give a competitive advantage over other offerors.

To complete negotiations properly, the contracting officer must advise each offeror within the competitive range that negotiations are being concluded, that the offeror is being asked for its "best and final offer," not merely to confirm or reconfirm prior offers, and that any revision or modification of proposals must be submitted before the negotiation cut -off date.

## **BEST AND FINAL OFFERS**

A request that offerors submit "best and final" offers allows them to change their proposals to reflect any revision or modification in their proposals that they may wish to make as a result of negotiations and communicates the closing of negotiations. Typically, best and final offers will result in revised cost proposals, technical proposals, or both. These revised proposals then become the definitive offers, which the Government will use in determining which offeror to select for contract award.

All offerors are given a common cut -off time to submit best and final offers. Offerors are prohibited from introducing new concepts or approaches at the best and final offer stage of the solicitation process.



Best and final offers are subject to a final evaluation of price or cost and other salient factors by the contracting officer and project officer, with assistance from a cost/price analyst, and an evaluation of technical factors by the technical evaluation panel, as necessary. Proposals may be technically rescored and reranked by the technical evaluation panel and a technical evaluation report prepared. To the extent practicable, the evaluation should be performed by the same evaluators who received the original proposals (see HHSAR Subpart 315.670).

#### **THE NEGOTIATION MEMORANDUM**

The negotiation memorandum or summary of negotiations is a complete record of all actions leading to award of a contract. It is prepared by the contracting officer in sufficient detail to explain and support the rationale, judgments, and authorities upon which all actions were predicated. The memorandum documents the negotiation process and reflects the negotiator's actions, skills, and judgments in concluding a satisfactory agreement for the Government.

The project officer should assist the contracting officer in providing documentary evidence to support the justification for award.

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#### **SELECTION AND AWARD**

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The HHSAR states that contract award should be made to "the offeror(s) whose proposal(s) offers the greatest advantage to the Government, price and other factors considered."

As stated earlier, it is usually necessary to conduct a second technical evaluation of proposals submitted as best and final offers. This second evaluation produces a ranking of proposals that aids in the selection of one (or more) offer for contract award.

The Department does not specify a formal source selection procedure. In most cases, the contracting officer makes the source selection based, at least partially, on input from the project officer. In some cases, where large and/or potentially sensitive acquisitions are involved, the contracting officer establishes a source selection procedure before initial

proposals are received. Such a procedure could take various forms. The two most common are:

Having a source selection official established (at an appropriate management level) who makes the decision; and

Constituting a source selection panel to make the selection decision.

There is also sometimes a source selection advisory counsel (SSAC), generally composed of the contracting officer and appropriate program and management personnel, constituted to advise the source selection official or panel.

#### **COMPLETION OF CONTRACT AWARD**

The contracting officer is responsible for preparing the final contract document. Before release of this document to the contractor for signature, the contracting officer coordinates with all parties to the negotiation to ensure that the final document fully delineates the agreement reached at negotiations and is representative of the needs of the program office. The contracting officer reviews all the contract and file documents for completeness, accuracy, and compliance with requirements.

The contracting officer then transmits the contract package to the contractor for acceptance and signature. The signed contract is returned to the contracting officer, who signs the contract on behalf of the Government. The contract becomes effective on the date signed by the contracting officer, unless otherwise specified in the contract. Finally, a copy of the fully executed contract is forwarded to the contractor, as well as to the project officer.

#### **PUBLICIZING THE AWARD**

All contract awards of more than \$100,000 are publicized in the Commerce Business Daily, however, the dollar threshold is not a prohibition against publicizing an award of a smaller amount if to do so would be advantageous to the industry or to the Government. Further, all unsuccessful offerors for awards exceeding \$100,000 are sent a "Notice of Award Letter." This letter advises them that their proposals were not accepted and gives the name of the successful contractor, the amount of the contract, and the number of proposals received.

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## DEBRIEFING UNSUCCESSFUL OFFERORS

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Any HHS employee who receives either a written or oral request for a debriefing from an unsuccessful offeror should immediately refer the request to the contracting officer. If the request is made orally, the contracting officer should require that the request be made in writing. The contracting officer must be present at all debriefings and must review written debriefings prior to release. A debriefing is intended to:

Tell an unsuccessful offeror which areas of its proposal were judged to be weak and deficient and whether the weaknesses or deficiencies were factors in its not having been selected; and

Identify the factors that were the basis for selection of the successful contractor. If the ability of the successful offeror to satisfy the mission requirement was the basis for selection, the unsuccessful offeror should be so informed, and given a general comparison of significant areas, but not a point -by-point comparison of all the elements considered in the evaluation criteria. If the successful offeror was selected on the basis of cost, the unsuccessful offeror should be told that was the case. If selection was based on other factors, they should be specified.

If an unsuccessful offeror believes that its failure to obtain the award was not justified, it will rely, at least in part, on the information given in the debriefing to determine whether it should seek recourse. Accordingly, it is essential that a debriefing be conducted in a scrupulously fair, objective, and impartial manner, and that the information given the unsuccessful offeror be absolutely factual and consistent with the findings of the contracting officer and the basis on which the award was made.

In some cases it may be necessary to arrange informal debriefings for an unsuccessful offeror's personnel by departmental technical evaluators.

A debriefing should not reveal confidential or privileged commercial or financial information, trade secrets, techniques, or processes of the other offerors or the relative merits or technical standing of the other unsuccessful offerors.

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## PROTESTS

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Offerors may object to an award by filing a protest with the contracting officer or higher authority. Protests frequently occur when:

A solicited source is provided with information on the Government's requirements that is not provided to all other solicited sources;

A program attempts to direct a procurement to a sole source who is only one of a number of sources who might perform the work;

One source improperly receives information on another's proposal during negotiation; or

Solicitation requirements are unnecessarily restrictive.

Because protests are often filed based on misunderstandings of the acquisition process or regulations, every debriefing should begin with a detailed description of the process used to select the successful offeror. When a protest is filed, the contracting officer is primarily responsible for resolving it, with assistance from the project officer.

**TABLE IV-1  
Uniform Contract Format**

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Section	
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<b>Part I - The Schedule</b>	
A	Solicitation/contract form
B	Supplies or services and prices/costs
C	Description/specifications/work statement
D	Packaging and marking
E	Inspection acceptance
F	Deliveries or performance
G	Contract administration data
H	Special contract requirements
<b>Part II - Contract Clauses</b>	
I	Contract clauses
<b>Part III List of Documents, Exhibits, and Other Attachments</b>	
J	List of attachments
<b>Part IV - Representations and Instructions</b>	
K	Representations, certifications, and other statements of offerors or quoters
L	Instructions, conditions, and notices to offerors or quoters
M	Evaluation factors for award

## SECTION V - POST-AWARD ADMINISTRATION

Contract administration involves ensuring that the contract is performed--as written--by both the contractor and the Government. No matter what type of contract is involved, a breakdown in administration can undo all previous achievements discussed in the other sections of this Handbook. The project officer must monitor a contractor's progress closely and make known to the contracting officer potential problems that threaten performance so that remedial measures may be taken.

Administration of a contract begins after negotiations have been successfully concluded and the contract has been signed; it ends at the closeout of the contract when performance has been completed and the contractor has received its final payment. Therefore, contract administration includes all the functions and duties relating to such tasks as:

- Monitoring the contractor's technical progress;

- Approving invoices for payment in accordance with contractual terms;

- Controlling government property;

- Monitoring subcontractors;

- Reviewing purchase orders;

- Overseeing contract modifications and terminations where authorized; and

- Performing other administrative tasks required by the contract.

Contract administration can be simple, or complex and time consuming, depending on the type of contract, contractor performance, and the nature of the work. For example, a fixed-price contract requires relatively little post-award administration, whereas a cost-type contract requires careful technical surveillance and auditing of costs and imposes an administrative burden on both the Government and the contractor. No matter what type of contract is involved, however, it should be closely monitored. If technical or business problems are not solved before they disrupt the contractor's scheduled performance, the Government may find itself in a situation with either a pending termination or a forced contract modification. Either is a poor remedy, considering the lost time or unnecessary costs that could have been avoided if the Government had administered the contract properly.

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## LIMITATIONS ON THE PROJECT OFFICER

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Contract administration is the responsibility of the contracting officer. The contracting officer is the only person who may modify the contract, or take any action to enter or change a contractual commitment on behalf of the Government. The legal responsibility for the contract rests with the contracting officer, who delegates certain authority to the project officer and holds the project officer accountable for exercising that authority properly. In fact, the project officer often is described as the contracting officer's technical representative (CUTTER), or by other similar terms.

In most cases, the contracting officer authorizes the project officer to perform independently the following functions in administering the technical aspects of the contract:

- Correspond directly with the contractor. Copies of all correspondence must be sent to the contracting officer. In situations where the project officer is not clear about the effect of the correspondence on contractual provisions, the correspondence should be cleared with the contracting officer in advance;

- Hold conferences with the contractor;

- Conduct on-site visits;

- Approve all technical data submitted by the contractor; and

- Provide direction to the contractor, as necessary, in technical matters when such direction involves situations such as choosing from among alternate methods that are:

  - within the scope of the contract as written, or

  - will not affect cost, period of performance, or other terms and conditions of the contract.

In addition to exercising delegated authorities, the project officer is expected to:

- Maintain a file documenting significant actions and containing copies of trip reports, correspondence, and reports and deliverables received under the contract; and

Advise and assist the contracting officer, as necessary, in administering the business aspects of the contract--reviewing vouchers, invoices, reports, and deliverables; coordinating program office decisions as they bear on the contract; and preparing final summary statements for contract closeout.

The project officer is not authorized to issue or approve changes in the contract or to enter into any agreement, contract modification, or any other matter changing the cost or terms and conditions of the contract.

#### **COMMUNICATING WITH THE CONTRACTING OFFICER**

The project officer functions only as the technical representative of the contracting officer. The contracting officer delegates certain contract administration functions to the project officer, but the legal responsibility for the contract remains with the contracting officer. The project officer functions as the "eyes and ears" of the contracting officer by monitoring technical performance, and reporting any potential or actual problems to the contracting officer. It is imperative that the project officer stay in close communication with the contracting officer, relaying any information that may affect contractual commitments and requirements.

The balance of this section discusses the myriad functions that contract administration entails, with special emphasis on the communication between the project officer and the contracting officer.

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#### **CONTRACT START-UP**

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Once a contract has been awarded, the project officer will be given a copy of the contract. The project officer's first responsibility is to read and understand the contract, keeping in mind the basic rules of contract interpretation.

Government contracts are subject to essentially the same common law rules of interpretation applied to other contracts. Several of these basic rules are:

The intent of the parties must be gathered from the whole contract.



The provisions of a contract should not be interpreted so as to render one or more meaningless, unless otherwise impossible, and the interpretation that gives reasonable meaning to the whole document is preferred.

The dominant purpose and the interpretation adopted by the parties will be used to ascertain the meaning of the contract provisions.

Specific provisions prevail over general provisions when in conflict.

A standard clause entitled "Order of Precedence" resolves inconsistencies within the contract provisions by assigning precedence in a specified order within the contract parts.

An ambiguous provision susceptible to more than one interpretation will be interpreted against the party responsible for creating it--in Government contracts this is almost always the Government, as the contract provisions are normally prepared by the Government.

Equally important to the performance of Government contracts, or more aptly the risk thereof, are the specifications or statement of work that the contractor must meet. Contract specifications dictate the nature and degree of performance to be undertaken by a contractor. When the specifications are accurate, complete, and realistic the only issue is contractor performance or, more properly, attributing the responsibility for a performance failure to either the Government or the contractor.

On the other hand, where specifications are shown to be defective or are such that performance is impossible, the contractor may either be excused for lack of performance or may be entitled to additional compensation if the cost of performance is increased.

Similarly, a mutual mistake of fact may result in an adjustment to the contract price. In this situation, there must be a mistaken concept by both parties as to a material fact that results in performance being more costly. The contractor, to recover the extra cost of performance, must show that the contract did not allocate to it the risk of such a mistake and that the Government received a benefit from the extra work for which it would have been willing to contract had the true facts been known.

## **STANDARD CONTRACT CLAUSES**

Section I of all HHS contracts contains a list of contract clauses applicable to that particular procurement that are incorporated by reference. The project officer should understand what these

clauses require. They can be found in either the FAR Part 52 or HHSAR Subpart 352.

## **POST-AWARD ORIENTATION AND CONFERENCES**

The fundamental task of Government contract administrators is to ensure that the contractor fulfills its obligations. Post -award orientation is a useful tool for ensuring good contractor performance by:

- Determining that the contractor understands the contract requirements;

- Clarifying contract administration procedures that will be applied; and

- Clarifying the roles of Government personnel who will be involved in administering the contract.

In relatively simple acquisitions, post -award orientation may be accomplished in a letter. This letter should identify the Government officials responsible for contract administration and clearly identify any special or unusual requirements, such as production tests, special reports, and subcontracting consent requirements.

The contracting officer may decide that a post -award conference is necessary when an analysis shows that the contractor may not have a clear understanding of the scope of all the technical or other requirements of the contract, or when there are other existing or potential problems that may adversely affect contract performance.

Any post -award orientation conference should be preceded by a meeting of all the Government personnel with administrative responsibilities for the contract to establish a coordinated Government position regarding the agenda and the specific responsibility of each Government representative. The agenda should cover all matters that need to be clarified or otherwise discussed with the contractor to avoid a misunderstanding of the contract requirements. These matters might include:

- Clarification of the specifications or the contents of the statement of work;

- Quality control and testing requirements;

- Special contract provisions;

- Reporting requirements;

Procedures for monitoring and measuring progress; and

Billing, voucher approval, and payment procedures.

If the contracting officer does not chair the orientation conference, this responsibility can be delegated to the project officer. The conference should be conducted in a businesslike manner, with the recognition that both parties have an existing contractual relationship and that the purpose of the conference is to promote accurate understanding of the contract, not to alter it.

Post-award orientation of subcontractors is the responsibility of the prime contractor. If it appears desirable for Government personnel to attend a subcontractor orientation conference, any Government representative attending should recognize that the Government has no privity of contract with the subcontractor. Therefore, all instructions, interpretations, or other contractual dealings with the subcontractor are the business of the prime contractor, not the business of the Government.

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## **INSPECTION AND ACCEPTANCE RESPONSIBILITIES**

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Before services or products required by the contract can be accepted, acceptability must be determined by review, test, evaluation, or inspection. These functions are performed by the project officer, who then reports the results to the contracting officer.

Final acceptance of the work effort by the contracting officer concludes performance by the contractor, except for administrative details relating to contract closeout. After final acceptance, the contractor can no longer be held responsible for unsatisfactory effort, unless otherwise specified in the contract. Therefore, the project officer must ensure that the work performed under the contract is measured against the work statement. If performance does not meet contract requirements, it is incumbent upon the project officer to identify deficiencies and to advise the contracting officer so that remedial action can be taken before final payment and contract closeout.

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## **CONTRACT MONITORING**

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The contractor has primary responsibility for performance of the contract, but the project officer and the contracting officer have a vested interest in continually monitoring contractor performance, because unsatisfactory performance under a contract may jeopardize a project and even an entire program.

Contract monitoring varies considerably both in intensity and in methodology, depending on the importance and size of the contract effort, as well as the type of contract. Cost -reimbursement -type contracts generally warrant closer monitoring because the Government's risk is higher than under a fixed -price contract.

In monitoring a contractor's performance, the Government is primarily interested in progress toward completion of the specified requirements and the financial status of the contract. One valuable tool in this area is reporting requirements. The Government, in the contract document itself, may require the contractor to provide just about any type of report conceivable. It must be remembered, however, that the Government is paying, as part of the contract price, for any reports required of a contractor. Reports are discussed in greater detail below.

Additional information may also be obtained in the form of letters and phone calls between the contractor and project officer and contracting officer. Visits to the contractor's facilities are sometimes necessary to evaluate the contractor's performance. However, it is important to maintain a reasonable balance. Although the Government has a right and a duty to monitor contractor performance, Government personnel may be subject to charges of interference in the contractor's operation or of making unreasonable demands if discretion is not used in this area.

## **REPORTS AND OTHER DELIVERABLES**

### **Technical Progress Reports**

Progress reports should include all relevant details to provide project officers with most of their information on the progress of the work. However, they should not become too burdensome to prepare. Technical progress reports may be submitted in letter form, and may include the number and names of persons working on the project; the facilities devoted to the work; the number of man-days expended; the direction of the work; and the latest

observations, problems encountered, predictions, and plans for the next reporting period.

Contractors should be encouraged to furnish preliminary technical information in these status reports even though it is tentative and not ready for widespread distribution. Researchers are often reluctant to commit themselves to premature technical conclusions, and it may be necessary to ensure the contractor that HHS will treat its technical progress information as privileged communications.

In addition to keeping the project officer informed of progress, the technical progress report gives the contractor an opportunity to stop periodically and evaluate its efforts in terms of the intent and specifications of the contract. The necessity for writing and analyzing progress reports forces both the contractor and the project officer to periodically evaluate the work in relation to all contractual requirements.

### **Financial Status Reports**

Financial reports are an important element in contract administration, especially in cost -reimbursement contracts. They reveal the financial status of the contract and provide information that is helpful in avoiding or anticipating cost overruns. Financial reports provide both the project officer and the contracting officer with a means of checking the contractor's expenditures based on cost elements and enable them to match the costs incurred with the technical results achieved.

The amount of detailed financial information required will vary, depending on the type of contract involved, the nature of the work or services being procured, and the method of payment. Under a cost reimbursement contract, the contractor is entitled to full and prompt payment for all incurred allowable costs, without any hold-back by the Government pending completion of performance. Therefore, cost -reimbursement contracts require close monitoring by the project officer so that the Government does not pay excess costs for the end product either because of a contractor's inefficiency (e.g., missed schedules, unacceptable reports, etc.), or as a result of unforeseen problems which, if promptly addressed, could prevent excess costs.

### **Deliverables**

As stated above, the project officer is responsible for determining whether products delivered by the contractor conform to the technical requirements of the contract. In discharging this responsibility, the project officer should keep in mind that, once a contractor's work has been formally accepted, the contractor is

excused from further performance or correction on work that has already been accepted, should it prove to be unsatisfactory.

In many HHS contracts, the end result or deliverable is a report or an instrument, such as a survey. The project officer is responsible for conducting a technical review of the report, comparing it to the requirements set forth in the contract statement of work and applicable specifications. Where appropriate, the project officer should solicit the comments and concurrence of other appropriate technical experts and/or from other affected program officers. Any required revisions must be transmitted to the contractor over the signature of the contracting officer.

In the event that the work is termed unsatisfactory, the project officer and the contracting officer must determine what further actions are required, asking the advice of legal counsel if necessary. The project officer should provide written notification to the contracting officer when the contract work has been judged complete and technically acceptable, so that the contracting officer can communicate acceptance to the contractor.

#### **SITE VISITS**

Site visits may be unnecessary for small, straightforward contracts, but when a contract is large and complex, they are indispensable.

Strictly speaking, site visits should be conducted jointly by the contracting officer and the project officer, but as a practical matter site visits are often delegated to the project officer. However, site visits should be cleared by the contracting officer, whether or not a representative from that office is making the site visit. A site visit is usually arranged in advance with the contractor. In rare cases, there may be a reason to make an unannounced visit, but these situations require careful consideration and should have the explicit approval of the contracting officer.

The purpose of a site visit is to check the contractor's performance. Specific reasons for making a site visit include:

- Checking actual contract performance against scheduled and reported performance;

- Seeing if the facilities and working conditions are adequate; and

- Verifying that the number of employees charged to a cost-reimbursement contract are actually performing work under the contract. For example, if the voucher shows 10 people assigned to the contract full -time, the Government

representative making a site visit should verify that these individuals are actually working on the contract.

## **REVIEWING VOUCHERS**

Contractors are required to submit a voucher to HHS, usually every month, using (Standard Form) SF -1034 or SF -1035, "Public Voucher for Purchases and Services Other than Personal." The project officer is responsible for reviewing these vouchers to assess the reasonableness of the costs claimed and relate the total expenditures to the physical progress of the contract, based on monitoring activities such as meetings, site visits, progress reports, etc. Any significant disparity between progress and expenditures may indicate the contractor is in trouble, and should be immediately brought to the attention of the contracting officer.

For cost-reimbursement contracts, where the work is budgeted by phase or task, approval of vouchers is controlled by these incremental limitations; therefore special care must be exercised to assure that costs are not incurred prematurely.

All contractor's vouchers submitted to the project officer by the contracting officer for review will contain the following certification: "Materials and/or services have been received and are acceptable in accordance with the terms of the contract." This statement must be attested to by the project officer. The project officer should review, sign and return these vouchers to the contracting officer within three days. The Prompt Payment Act requires the Government to pay interest on vouchers that have not been paid 30 days after the Government has received them, and there are many steps in processing a voucher for payment after the project officer has signed off on it.

Vouchers for fixed price contracts will be processed for payment after approval by the project officer. Vouchers for cost-reimbursement contracts will be immediately submitted to the payment office upon receipt by the contracting officer. A copy will be provided to the project officer for concurrent review. When deliverables are late, the contracting officer will withhold payment until the deliverables have been submitted.

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## INADEQUATE CONTRACTOR PERFORMANCE

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In a delinquency or default situation, contractor performance is delayed, inadequate, or both. Project officers must thoroughly understand the rights and responsibility of both the Government and the contractor so that they will do nothing that might be considered prejudicial to either party.

When unsatisfactory contract performance is identified, the project officer should notify the contracting officer promptly so that remedial steps can be taken. Silence on the part of the Government could be interpreted by the contractor as revised Government expectation of performance, which may differ from that stated in the contract. Such situations could adversely affect the Government's right to withhold payments, terminate for default, or otherwise exercise certain rights under the contract.

Unsatisfactory performance can be considered in degrees, and the Government's actions can be oriented to correct the unsatisfactory performance or to protect the Government's interest in the event of a contractor's default. Depending upon the contracting officer's evaluation of the seriousness of the unsatisfactory performance he/she may:

- By letter or through a meeting, bring the particular deficiency to the attention of the contractor and obtain a commitment for appropriate corrective action;

- Extend the contract schedule if excusable delays in performance are involved;

- Withhold contract payments in cases where the contractor fails to comply with delivery or reporting provisions of the contract; or

- Terminate the contract for default.

After a complete review of the situation, the contracting officer may send a notice of failure of performance to the contractor. This notice, which officially notifies the contractor of the delinquency, requires the contractor to inform the contracting officer of the cause(s) of the delinquency so that a proper determination can be made concerning continuation or termination of the contract.

Without express authority from the contracting officer to the contrary, the project officer should have no contact with the



contractor during this period. Any action that might encourage the contractor to continue performance may have the effect of waiving the Government's rights under the contract.

#### **WITHHOLDING PAYMENT**

All Government contracts contain a clause allowing the Government to withhold payments. A contractor's failure to either submit a report, or to perform or deliver services or work when required by the contract is to be considered a default in performance. In either circumstance, the contracting officer is directed to immediately issue a formal "cure notice," which is to include a statement to the effect that contract payments will be withheld if the default is not "cured" or is not determined to be excusable. A "cure notice" is a formal notice from the contracting officer pointing out a deficiency in contractor performance and directing that it be "cured" within a specified time--usually 10 days.

If the default is not determined to be excusable or a response is not received within the allotted time, the contracting officer initiates withholding action on all contract payments and determines whether termination for default or other action would be in the best interest of the Government.

When determination is made that contract payments should be withheld, the contracting officer should immediately notify the contractor, in writing, that payments have been suspended until the default or failure is cured.

#### **TERMINATIONS**

Situations may arise when the work contracted for does not run to completion. Two standard contract clauses are designed to cover this eventuality: the "Termination for Convenience of the Government" clause and the "Default" clause. Both types of terminations can be either partial or complete, that is, all or any part of the work can be subject to the termination. The portion that is not terminated must be completed by the contractor. The contractor has no contractual right to decide that the remaining work is insufficient to merit its attention and then opt not to continue with it. No matter what type of termination is issued, or the extent of the terminated portion of the work, the decision to terminate is a unilateral right of the Government.

##### **Termination for Convenience**

The Termination for Convenience clause gives the Government the right to cancel a contract when to do so is in the best interest of the Government, notwithstanding the contractor's ability and

readiness to perform.

Termination for convenience requires that a financial settlement be made for the work that has been accomplished under the contract up to the effective date of the termination.

Settlements may be reached by one, or a combination of the following methods:

Negotiated agreement;

Determination of the contracting officer; and

Costing out under invoices or vouchers (in the case of costs under cost -reimbursement contracts).

Following the termination, the Government and the contractor may need to reach an agreement on an equitable settlement. The contracting officer evaluates the contractor's settlement claim and establishes the Government's position with respect to the various elements of cost or price included. A cost or price analysis must be performed and, in some cases, the contractor's books and records must be audited. A memorandum documenting the negotiations must be placed in the contract file.

### **Termination for Default**

The Termination for Default clause allows the Government to terminate the contract when the contractor fails to make progress with the work or to perform any other contract requirements within the period provided by a "cure notice." The detailed conditions under which a contract may be terminated for default, and the procedures for doing this are set forth in FAR Part 49. Once a contracting officer has determined that it is necessary to invoke the Termination for Default clause, the project officer should have no further contact with the contractor unless specifically directed to do so by the contracting officer.

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## **CONTRACT MODIFICATIONS**

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A contract modification is a written alteration of contract provisions, i.e., work statement, period of performance, quantity, price or other provisions of a contract, whether accomplished in accordance with a contract provision or by mutual agreement of the parties. During the contract life, different types of modifications may be necessary to incorporate new requirements or to handle problems that develop after contract award. Contract

modifications must be made in writing by the contracting officer in order to preclude misunderstanding between the parties concerning work to be performed.

## **TYPES OF MODIFICATIONS**

### **Modifications Made Pursuant to Contract Clauses**

Various contract terms and provisions provide for modifications to a contract if certain conditions arise or if information not known at the time of contract award becomes available. For example, the Government Furnished Property clause provides for equitable adjustment of the contract estimated cost and performance dates in the event the property furnished by the Government is not suitable for the intended use. The Limitation of Cost clause used in cost-reimbursement contracts permits funding of cost overruns, when authorized. These two clauses, and the standard Changes clause (discussed in detail later in this section) are the most commonly used to effect contract modifications.

### **Supplemental Agreements**

A supplemental agreement is a bilateral revision of the contract that either adds work or revises the existing terms of the contract. Such agreements may have cost implications. Supplemental agreements are generally used under the following circumstances:

- To provide an equitable adjustment when a change order has been issued pursuant to the Changes clause, Government -furnished Property clause, and other clauses or special provisions of the contract;

- When it is necessary to change the contract price, delivery schedule, quantity, or other terms of the contract;

- When the Government wishes to modify a contract and the proposed modification is for work that is an inseparable part of the original procurement;

- To finalize the settlement agreement when a contract has been terminated for convenience of the Government; and

- To permit a contractor to complete a contract after a non-excusable delay when the contractor assumes liability for actual damages.

## **Modifications Involving New Acquisition Actions**

Before initiating a modification, it is necessary to determine that it is within the scope of the existing contract rather than a "new procurement" outside the scope of the contract. A "new procurement" must be conducted as a separate procurement action.

If a new procurement is involved and the Government decides to contract with a contractor who is already providing the desired services (under an existing contract), the new requirement may be covered by a new contract or by a modification to the existing one.

Regardless, this new (or continuing) requirement must be treated as a new procurement and processed as such. This means that a synopsis must be published in the Commerce Business Daily, as discussed in Section III. As a general rule, 10 days should be allowed in the schedule for the synopsis to reach the Commerce Business Daily after it is mailed. The solicitation may not be issued until 15 days after it has been published, and the proposal deadline may not be less than 30 days after that.

When a new procurement is contemplated, it should be subject to competition; it cannot be awarded automatically to a contractor simply because the contractor has a current contract with HHS. If the new procurement is to be awarded noncompetitively, it must be justified as a noncompetitive procurement.

## **CONSIDERATION FOR CONTRACT MODIFICATION**

Generally there must be consideration whenever a contract is modified. "Consideration" is the benefit each party confers upon the other for the modification.

Although contract modifications usually result in price increases, they may sometimes result in price reductions. The requirement for consideration, as set forth in various decisions of the Comptroller General, is that no officer or employee of the Government may alter a contract to the prejudice of the Government unless the Government receives corresponding, tangible contractual benefits. Thus, there is no such thing as a "no cost" extension to the period of performance of a contract. If the Government allows a longer period of time for delivery, the "cost" to the Government is its right to delivery of the product or service by the date agreed upon. The law requires the contractor to provide some form of consideration for the Government's giving up of that right.

Certain administrative changes may be made without consideration provided the contractor's rights are not affected; e.g., change in the appropriation data or a change in the paying office, etc. Once a valid contract is executed, no adjustment can be made to

its terms merely because it may appear, in retrospect, that either the contractor or the Government has made a "bad bargain."

## **PROCESSING CONTRACT MODIFICATIONS**

Requests for unilateral modifications are initiated by the Government. Unilateral modifications (such as administrative changes or exercise of the provisions of the Changes clause) are within the authority of the contracting officer, without agreement from the contractor. Modifications resulting from bilateral modifications can be initiated by a written request from either the Government or the contractor. For these modifications (called bilateral or supplemental agreements) the project officer must prepare a supporting memorandum to document the need for the modification and to provide other appropriate information necessary to process it. The memorandum should contain the following information.

- The number of the contract being modified and the modification number.
- The contract title (project identification).
- The complete name and address of the contractor.
- The names, mailing addresses, and telephone numbers of the project and alternate project officer.
- The type of modification recommended;
- The basis for the modification. Explain the circumstances (i.e., who, what, when, where, and why) that resulted in the need for the modification and the reasons why a modification should be made.
- A brief description of the contractor's performance, as well as the identification of any known problem areas.
- An independent Government estimate of cost for the modification.
- The estimated total time necessary to accomplish the required services; and
- A complete description of the work to be changed or modified.

Concurrences for contract modifications must be obtained to the extent that such modifications result in new or additional requirements that are subject to a concurrence. For example, a new report format used by 10 or more respondents would require OMB approval. The contracting officer must advise project officers of the need for such concurrences.

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## CHANGE ORDERS

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The contract clause entitled **Changes** distinguishes Government contracts from other contracts by the control over performance vested in one of the contracting parties--the Government.

Unlike contracts in the private sector where performance must conform to pre-agreed terms in the absence of a modification issued by both parties, the Changes clause in a Government contract allows the Government to alter the work to be performed without the consent of the contractor.

The clause provides, in essence, that the contracting officer may by written order make any change in the work within the general scope of the contract. Such changes may result also in an appropriate upward or downward equitable adjustment in the contract price, delivery schedule, or time for performance. Additionally, the clause provides that a dispute over the equitable adjustment is a question of fact under the "Disputes" clause, and that nothing in the Changes clause excuses the contractor from proceeding with the contract as changed. This power, unique to Government procurement, allows the contracting officer to alter performance without unnecessary interruption and to subsequently determine the appropriate contract price adjustment.

The Changes clause imposes certain requirements for issuing a valid change order. The first of these requirements is that the change be ordered by the contracting officer. The clause also states that the change must be made by written order. One of the more important requirements is that the change ordered must come within the general scope of the contract.

Though these specific requirements are included in the Changes clause and are thus a part of the contract, courts and various appeals boards have acted in such a way so as to negate or modify some of the requirements. This is especially true in the area of constructive changes. The rest of this part focuses on constructive changes because this type of action can most involve a project officer.

## CONSTRUCTIVE CHANGES

A **constructive change** arises whenever, by informal action or inaction of the Government, the situation of the contractor is so altered as to have the same effect as though an order had been issued under the Changes clause. The term is derived from the verb "to construe"--not from "to construct." Thus, the constructive change is a situation that can be construed as having the effect of a Change Order.

There are several ways in which a constructive change occurs. The list provided below is not all-inclusive, nor is it black and white. This is an area of equity or fairness--and fairness depends greatly on the situation. An action by the Government may lead to a successful claim by a contractor under such principles--but in a very similar situation, the claim will be successfully defended by the Government.

### Common Causes of Constructive Changes

The following are the most common among the many ways in which a constructive change can occur:

- Inadequate (latently defective) specifications;
- Improperly interpreted specifications;
- Overly strict inspection;
- Failure to recognize delays caused by the Government;
- Technical defects in the Change Order process; and
- Improper technical direction.

If a **specification is defective** in such a way that reasonable review prior to preparation of a bid or proposal would not disclose the defect (i.e., the defect is latent), this has the effect of making the work more difficult for the contractor than is reasonably expected. Adding a work requirement in this accidental manner is tantamount to making a change to the specifications. It leads to an obligation on the part of the Government to make an equitable adjustment in a fashion similar to that which would be made under the Changes clause. This general area includes cases where performance is completely impossible.

If, during the course of contract performance, questions arise concerning the **meaning of the specifications** (or other terms of the contract), the contractor is generally required to inquire of the Government as to the meaning. The Government's interpretation may differ from the contractor's. Under the Disputes clause, the contractor must comply with any "final decision" of the contracting officer. Later, this disagreement may be subject to review by a Claims Court. If it is determined that the Government had required more than a reasonable reading of the specifications would require,

then the contractor is entitled to an adjustment.

**Overly strict inspection** is closely related to erroneous interpretation of specifications. Presume that a delivery has been made. The project officer, in the role of inspector, rejects the items and requires certain corrections. The contractor then makes those corrections. If the contractor later makes a claim for additional work, and it is determined that the initial delivery was not defective, the adjustment will be under the principles of constructive change.

If the **Government causes a delay** for the contractor--but then insists on having the original delivery schedule met--this is a constructive acceleration. Time should have been added for performance.

Finally, there are the cases of **improper technical direction**, usually from the project officer. The difference between improper technical direction and overly strict inspection or erroneous interpretation of specifications, is that the error occurs because the project officer either does not bother to determine the limits of his/her authority, or deliberately ignores such limits. For example, the project officer decides that something needs to be done and attempts to get the contractor to do it for "free". In a great many cases, this kind of error in procedure does not lead to a claim. Contractors will often comply with improper orders for "free" services because they want to maintain the goodwill of the project officer, whose opinions can affect their chances for future work. But if this happens too often, most contractors will eventually begin to follow the lead set by the project officer. The most common form of this is for the contractor to say to the project officer: "We have made several changes for you at no charge, surely you can overlook this little defect?" Thus contracts with supposedly enforceable obligations on both parties end up becoming a mockery.

### **How to Avoid Constructive Changes**

Careful preparation of initial contracts (removing ambiguities or inconsistencies from the specifications) is the first step in avoiding constructive change. This includes careful drafting of a formal modification. The Government often does not consider the magnitude of the effect a modification will have on the contractor.

For example, when an equitable adjustment is negotiated, the Government does not allow the contractor enough additional time to perform. This, in turn, creates a constructive change for which an adjustment will become due.



The second step in avoiding constructive changes is for the project officer to know what the contract requires. Both erroneous interpretation of specifications and overly strict inspection tend to result from a failure by the project officer to read the contract carefully. When decisions are made based on what "everybody" knows the specifications ought to say rather than on what they really do say, claims frequently result.

The third step is for the project officer to keep proper records. For example, if, during an interim inspection, the project officer tells the contractor that some aspect of performance is inadequate, the aspect should be explained in writing, with a copy transmitted to the contractor through the contracting officer.

Documentation of final inspections is also important. It is not sufficient to tell the contractor that the product is unacceptable.

Specific problems should be identified in writing. Contractors can mistake a general comment about one way to correct a problem as specific direction that this is the only acceptable way. Good documentation can eliminate that sort of misunderstanding.

Finally, the project officer must always act in good faith and must always follow Government procedures. Do not try to get something for nothing. Do not try to get around the paperwork. The Government loses claims--and the reasonable technical cooperation of its contractors--when the project officer circumvents the required procedures and principles.

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## **RESOLVING DISPUTES**

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No matter how carefully a contract is negotiated and written, due to the complex nature of the Government contracting process and the involved relationship between the contractor and the Government, disputes can and often do arise under Government contracts. The Disputes clause included in all Government contracts is designed to ensure that disagreements between the Government and the contractor will not interfere with the scheduled performance of the contract.

It also provides a channel through which disagreements and differences can be resolved by the persons directly involved.

The contracting officer has wide powers to settle contractual matters. Some of the matters that may be settled by decision of the contracting officer are making equitable adjustments pursuant to the Changes and Government Furnished Property clauses; reducing prices under the Inspection clause; and providing for reimbursement for extra work performed. If agreement can be reached between the two parties in regard to the equitable adjustments, additional reimbursement, or refunds required under any contract clause, a

bilateral agreement may be negotiated between the two parties.

If agreement cannot be reached, these issues, as well as others involving disagreements, are resolved under the procedures set out in the Disputes clause.

The standard Disputes clause included in all Government contracts provides:

The contract is subject to the Contracts Disputes Act of 1978 (PL 95 -563).

For contractor claims of \$50,000 or less, the contracting officer must render a decision within 60 days. For contractor claims in excess of \$50,000, the contracting officer must decide the claim within 60 days or notify the contractor of the date when the decision will be made.

The contracting officer's decision is final unless the contractor appeals or files a suit as provided in the Act.

The authority of the contracting officer under the Act does not extend to claims or disputes which by statute or regulation other agencies are expressly authorized to decide.

Interest on the amount found due on contractor claims is paid from the date the claim is received by the contracting officer until the date of payment.

Except as the parties may otherwise agree, pending final resolution of a claim by the contractor arising under the contract, the contractor must proceed diligently with the performance of the contract in accordance with the contracting officer's decision.

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## **GOVERNMENT PROPERTY**

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Government regulations state that a contractor may be provided Government property or allowed to acquire such property at Government expense upon determination that:

No practicable or economical alternative exists; e.g., acquisition from other sources, utilization of subcontractors, rental property, or modification of program project requirements, etc.;

The Government receives adequate consideration for providing the property; or

Furnishing Government property is likely to result in substantially lower cost to the Government for the items produced or services rendered when all costs involved are compared with the cost to the Government of the contractor's use of privately -owned property.

The determination that it is necessary to provide a contractor or subcontractor with property will be made by the contracting officer with the advice of the agency property official.

When Government property is provided under a contract, the project officer frequently will be asked to advise or assist the contracting officer in administering its use.

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## **SUBCONTRACTS**

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Subcontracting is contracting between a prime contractor and one or more other organizations or individuals to obtain goods or services to carry out the objectives of the prime contract. In the case of a prime contract, the Government is the buyer and the contractor is the seller. However, when the contractor lets subcontracts, the contractor becomes the buyer, while the subcontractor becomes the seller. The prime contractor and the Government have a direct legal relationship. No such direct legal relationship exists between the Government and the subcontractor. Even in acquisitions where the contract specifies that the Government has a right to review and approve subcontracts, no direct relationship between the Government and the subcontractor is established.

## **ADMINISTRATION OF SUBCONTRACTS**

The prime contractor, not the Government, is responsible for administering subcontracts. When the Government buys the services of a contractor it is buying, among other services, its management services. It is the responsibility of the prime contractor in an acquisition to ensure the performance of the subcontractor. Nevertheless, there are a number of monitoring and contract administration functions a project officer can perform to promote effective subcontract operations.

## **ACTION PRIOR TO AWARD**

The project officer has the opportunity to begin monitoring the subcontracting process prior to award. When the project officer reviews proposed subcontracts before forwarding them to the contracting officer for approval, the FAR suggests that the following questions be asked:

Is the decision to subcontract consistent with the contractor's approved make -or-buy program, if any? (See FAR Part 15.7.)

Is the subcontract for special test equipment or facilities that are available from Government sources? (See FAR Part 45.3.)

Is the selection of the particular supplies, equipment, or services technically justified?

Has the contractor complied with the prime contract requirements regarding labor surplus areas or small business subcontracting, including, if applicable, its plan for subcontracting with small business concerns and small disadvantaged business concerns? (See FAR Part 19)

Was adequate price competition obtained or its absence properly justified?

Does the contractor have a sound basis for selecting and determining the responsibility of the particular subcontractor?

Has the contractor performed adequate cost or price analysis or price comparisons and obtained accurate, complete, and current cost or pricing data, including any required certifications?

Has adequate consideration been obtained for any proposed subcontract that will involve the use of government -furnished facilities?

Has the contractor adequately and reasonably translated prime contract technical requirements into subcontract requirements?

In reviewing the proposed subcontract, the project officer should be especially careful if:

The prime contractor has had previous subcontracting problems;

There has been little or no competition for the goods or services;

There is a close relationship between the prime contractor and the proposed subcontractor; and

The subcontract is to be placed on a time and material, cost-reimbursement, labor hour, fixed -price incentive, or fixed-price redeterminable basis.

#### **ACTION AFTER AWARD**

After the subcontract has been let, it is the prime contractor's responsibility to manage it. But here again, the project officer has certain responsibilities to ensure that the prime contractor is managing it adequately. The project officer can review the effectiveness of the contractor's subcontract administration function. Observations can be made of such things as the support, direction, and timeliness of actions provided by the contractor to subcontractors.

An important area to be covered in any review of subcontract administration is the contractor's system for making subcontract changes. Procedures must provide not only for timely processing of changes but also for prompt notification of all parties concerned, including the Government.

Often subcontracting administration is reviewed as part of an overall Contractor Purchasing Systems Review (CPSR). Generally, a review is made of the purchasing system, including its policies, procedures, and performance under that system. The FAR requires that in a CPSR special attention be given to:

The degree of pricing competition obtained;

Pricing policies and techniques, including methods of obtaining accurate, complete, and current cost and pricing data and certification as required;

Whether the contractor has obtained the contracting officer's consent prior to placing subcontracts falling in the approval zone; and

Whether the contractor has obtained adequate competition for subcontracts, including competition from small and small disadvantaged firms.

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## OPTIONS

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Under circumstances specified in the FAR Part 17.2 (e.g., the option quantity may not exceed 50 percent of the initial quantity) and the HHSAR Subpart 317.2, contracting officers may include option provisions in contracts.

The HHSAR defines an option as "a provision in a contract under which, for a specified time, the Government may elect to purchase at an established price, or at a price that can be established by reference to some specific method of calculation which will make the price certain, additional quantities of the supplies or services called for by the contract. An option may call for delivery of the option quantity within the initial contract period or may call for delivery of the option quantity subsequent to the initial contract period."

Options are most often used in situations where the Government is indefinite as to the quantities it requires. A contract with an option provision will allow for the purchase of a specified quantity, with the Government retaining the right to purchase a specified further quantity at a set price at some later time.

Option provisions invariably contain a statement to the effect that the Government will notify the contractor within some specified time (e.g., 60 days prior to the expiration date of the contract) of its intent to exercise the option.

The decision to acquire the option quantity is primarily the project officer's. In order to avoid the possibility of losing the Government's right to exercise the option, the project officer must notify the contracting officer of this decision in sufficient time to allow the contracting officer to put the contractor on notice within the time specified in the contract.

To exercise an option, revalidation of the requirement as well as a market analysis to establish that doing so is in the Government's best interest, may be required. If so, the project officer will have a role to play in these functions.

The project officer is also responsible for providing the funds necessary to pay for the option quantity.

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## INCREMENTAL FUNDING

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An incrementally funded contract is a contract in which the total work effort is to be performed over multiple time periods and funds are allotted to cover discernible phases or increments of performance.

The incremental funding technique can only be applied to cost-reimbursement contracts for the acquisition of research and development services and other types of nonpersonal services such as studies, surveys, and socioeconomic demonstration projects. It shall not be applied to architect-engineer services, construction services, or services subject to the Service Contract Act of 1965, as amended. This funding technique allows for contracts to be awarded for periods in excess of one year, even though the total estimated amount of funds expected to be obligated for the contract are not available at the time of the contract award.

It is Department policy that contracts for projects of multiple-year duration be fully funded, whenever possible, to cover the entire project. However, incrementally funded contracts may be used when:

- A project, which is part of an approved program, is anticipated to be of multiple -year duration, but funds are not currently available to cover the entire project;

- The project represents a valid need of the fiscal year in which the contract is awarded and of the succeeding fiscal years of the project's duration, during which additional funds may be obligated by increasing the allotment to the contract;

- The project is so significant to the approved program that there is reasonable assurance that it will command a high priority for proposed appropriations to cover the entire multiple -year duration; and

- The statement of work is specific and is defined by separate phases or increments so that, at the completion of each, progress can be effectively measured.

The following general guidelines, from HHSAR Subpart 332.703 -1, are applicable to incrementally funded contracts:

- The estimated total cost of the project (all planned phases or increments) is to be taken into consideration

when determining the requirements that must be met before entering into the contract; i.e., justification for noncompetitive acquisition, approval of award, etc.

The RFP and resultant contract are to include a statement of work describing the total project covering the proposed multiple -year period of performance and indicating timetables consistent with planned phases or increments and corresponding allotments of funds.

Offerors will be expected to respond to RFPs with technical and cost proposals for the entire project, indicating distinct break -outs of the planned phases of increments.

Negotiations will be conducted based upon the total project, including all planned phases or increments, and the multiple -year period of performance.

Sufficient funds must be obligated under the basic contract to cover no less than the first year of performance, unless the contracting officer determines it is advantageous to the Government to fund the contract for a lesser period. In that event, the contracting officer shall ensure that the obligated funds are sufficient to cover a complete phase or increment of performance representing a material and measurable part of the total project, and the contract period shall be reduced accordingly.

Because of the magnitude of the scope of work and multiple year period of performance under an incrementally funded contract, there is a critical need for careful program planning. Program planning must provide for appropriate surveillance of the contractor's performance and adequate controls to ensure that projected funding will not impinge on the program office's ability to support, within anticipated appropriations, other equally important contract or grant programs.

An incrementally funded contract must contain precise requirements for progress reports to enable the project officer to effectively monitor the contract. The project officer should be required to prepare periodic performance evaluation reports to facilitate the program office's ultimate decision to allot additional funds under the contract.



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## CONTRACT CLOSEOUT

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A contract is completed when all services have been rendered; all articles, material, report data, exhibits, etc., have been delivered and accepted; all administrative actions accomplished; and final payment made to the contractor. Contract closeout actions are primarily the responsibility of the contracting officer, but the assistance of the project officer will be required to certify that all services have been rendered in a satisfactory manner and all deliverables are complete and acceptable. The project officer's assistance is indispensable when disputes, litigation, patent and copyright problems, etc., are involved. In the case of consulting contracts, the project officer will be required to complete an "assessment report," assessing the contractor's performance.

Upon completion of the contract, the contracting officer must ensure or determine, as applicable that:

- All services have been rendered;

- All articles have been delivered and accepted;

- All payments and collections have been made;

- Release from liabilities, obligations, and claims have been obtained from the contractor;

- Assignment of refunds, credits, etc. have been executed by the contractor;

- All administrative actions have been accomplished, including the settlement of disputes, protests, and litigation; determination of final overhead rates; release of funds; and disposal of property etc.; and

- The file is properly documented.

The file must include all inspection and acceptance documents, or a statement from the project officer that all services and deliveries required by the contract have been performed or delivered in accordance with the terms of the contract and are acceptable to the Government. All discrepancies in actual performance or delivery with contract requirements must be reconciled before the contract file is closed.

All public vouchers and contractor invoices that support advance,

partial, progress, and final payments must be included. The contract file must also include written documentation related to settlement of any questions of disallowed or suspended costs or any discrepancies between payments and deliveries or performance, and between billings and payments.

If there was a subcontract, the file must contain subcontract approvals, including the letter or document of approval and the subcontract review memorandum. If approval of individual subcontracts is waived by approval of the contractor's purchasing system, approval must be included in the contract file. The file must also contain documentation of the resolution of disputes between prime and subcontractors, unless the prime contractor releases the Government from any obligation relating to the subcontractor's claim.

Contract modifications that result from additions or changes to the terms and conditions must be included, as must inventory and records of disposition of Government -owned property. All clearance and reports relating to inventories, patents, royalties, copyrights, publications, tax exemptions, etc. should go into the file. Also the file must contain copies of inquiries and answers and reports to and from sources such as the Congress, the General Accounting Office, audit activities, etc.

## **AUDITS**

An audit is required to close all negotiated procurements over \$25,000. This is the sole responsibility of the contracting officer. Whenever a procurement is less than \$250,000, a desk audit may be performed by the contracting officer in lieu of an actual audit conducted by the HHS Audit Agency.

A desk audit is the review of a contract file by the contracting officer to determine, based on knowledge of appropriate contract cost principles and the contractor's accounting and billing procedures, the amount to be paid under the contract.

Desk audits may include but need not be limited to:

- A review of contract provisions, e.g., negotiated overhead rates or advance understanding on particular items of cost;

- A review of available audit reports that may provide guidance as to what adjustments may be applicable to

the contract under review and, if appropriate, discussions with the cognizant Government auditor;

A request for, and review of, supplemental data required to support voucher cost elements; and

Comparison of claimed costs with those agreed to during negotiations.

Upon completion of the desk audit, the contracting officer prepares a desk audit report documenting findings, recommendations, and action taken.

A verification of actual costs must be made by the HHS Audit Agency or the Defense Contract Audit Agency for cost -type contracts over \$100,000 and fixed -price contracts when they include price redetermination provisions.

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## **CONTRACT FILES AND PROJECT FILES**

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The FAR is quite specific about the requirements for establishing, maintaining, and disposing of contract files. These files must be maintained by the contracting officer and must be sufficient to constitute a complete history of the transaction for the purpose of:

Providing a complete background as a basis for informed decisions at each step in the acquisition process;

Supporting actions taken;

Providing information for reviews and investigations; and

Furnishing essential facts in the event of litigation or congressional inquiries.

There are no regulatory requirements for a project officer to maintain a contract file. However, a project file will enhance the project officer's ability to effectively and efficiently monitor a contractor's progress, as well as provide data that will ensure continuity in contract administration should there be a change in project officers during the course of a contract. Such a project file should contain data specifically related to

the project officer's role and responsibilities. These data include copies of the:

RFP and any subsequent amendments;

winning proposal;

contract and any subsequent contract modifications;

negotiation documents;

work plan schedules;

budgets and invoices, and any correspondence between the project officer and the contracting officer concerning project budgets and expenditures;

products, submitted by the contractor;

correspondence between the contractor and the project officer;

contractor's interim and progress reports, as well as all draft and final deliveries; and

copies of any press releases, records, or letters concerning project results.

## SECTION VI - STANDARDS OF ETHICAL CONDUCT

Each year, the Federal Government spends in excess of \$100 billion on acquisitions. With this magnitude of spending, it is inevitable that public officials who participate in the acquisition process will come under close public scrutiny and may occasionally be subjected to situations that may lead to improprieties, abuse of office, fraud, or theft.

By virtue of their unique position and responsibilities regarding the acquisition process, project officers are particularly susceptible to improper influences from those who seek to do business with the Government. Therefore, project officers should take particular care to familiarize themselves with both Government-wide and departmental regulations governing standards of ethical conduct for Government employees. \*The HHS Personnel Pamphlet Series No. 6, "Standards of Conduct," contains the departmental regulations. This section briefly discusses those ethical conduct standards that are particularly relevant to project officers.

\* Government-wide standards are found at 5.C.F.R. Part 2635.

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### GIFTS

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Employees are prohibited from soliciting or accepting gifts from prohibited sources or gifts given because of their official position. The term "prohibited source" includes anyone seeking business with or official action by an employee's agency and anyone substantially affected by the performance of an employee's official duties. For example, a company bidding for an agency contract or a person seeking an agency grant would be a prohibited source of gifts to employees of that agency.

The term "gift" is defined to include nearly anything of monetary value. However, it does not include items that clearly are not gifts, such as publicly available discounts and commercial loans and it does not include certain inconsequential items, such as coffee, donuts, greeting cards and certificates.

There are several exceptions to the prohibitions against gifts from outside sources. For example, with some limitations, employees may accept:

- Unsolicited gifts with a market value of \$20 or less per occasion, aggregating no more than \$50 in a calendar year

- from any single source;
- Gifts motivated by a family relationship or personal friendship;
- Free attendance at certain widely-attended gatherings, such as conferences and receptions, when the cost of attendance is borne by the sponsor of the event; and
- Food, refreshments and entertainment at certain meetings or events while on duty in a foreign country.

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## CONFLICTING FINANCIAL INTERESTS

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The Government-wide Standards of Ethical Conduct deal with Government employees' participation in matters affecting a personal financial interest. Basically, the standards prohibit an employee from participating "personally and substantially" as a Government employee in a matter in which any of the following individuals or organizations has a financial interest:

The employee, the employee's spouse, the employee's minor child, or the employee's general partner;

An organization in which the employee serves as an officer, director, trustee, general partner, or employee; or

A person or organization with which the employee is negotiating for prospective employment or has an arrangement for prospective employment. In acquisition matters, this means that a contracting officer, project officer, proposal evaluator, source selection official, or any other Government official having a financial interest in one or more offerors responding to a proposal would be prohibited from engaging in decisions, approvals, disapprovals, recommendations, and investigations; providing advice; or making any other significant effort regarding the acquisition process. This includes participating in drafting specifications or statements of work for acquisitions when the drafter expects a company in which he or she has a financial interest to submit a proposal.

Criminal penalties may be imposed under 18 USC 208 for violations of these prohibitions. The Standards provide alternatives to non participation which may involve selling or giving up the conflicting financial interest or obtaining a statutory waiver that will permit the employee to continue to perform specific official duties. Consult with your deputy ethics counselor for full details.

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## IMPARTIALITY IN PERFORMING OFFICIAL DUTIES

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There may be circumstances other than conflicting financial interests in which employee should not perform official duties in order to avoid an appearance of loss of impartiality.

Employees should obtain specific authorization before participating in certain government matters where their impartiality is likely to be questioned. These matters include those:

- Involving specific parties, such as contracts, grants or investigations, that are likely to affect the financial interests of members of employees' households; or
- In which persons with whom employees have specific relationships are parties or represent parties. This should include, for example, matters involving employers of spouses or minor children, or anyone with whom employees have or seek a business or financial relationship.

Executive Order (E.O.) 11222 extends this policy somewhat in providing that "an employee need not have a financial interest that actually conflicts with his or her duties to violate the prohibition of Executive Order 11222. Any financial interest that could reasonably be viewed as an interest which might compromise the employee's integrity, whether or not this is in fact true, is subject to this prohibition."

Generally, employees who will have a conflict of interest, as described above, must disqualify themselves from participating in the acquisition process. However, this discussion of conflict of interest is only a general treatment of a fairly complex subject. Government employees who are required to participate in a particular procurement that may present them with a conflict of interest should refer to the applicable sections of the HHS Standards of Conduct and E.O. 11222 for full details.

Consult your deputy ethics counselor for the procedures by which employees may be authorized to participate in such matters when it serves the agency's interests.

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## USE OF OFFICIAL INFORMATION

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The public interest requires that certain information in the possession of the Government be kept confidential, and released only with general or specific authority under Department or other regulations. Such information may involve the national security or be private, personal, or business information that has been furnished to the Government in confidence. In addition, information in the possession of the Government and not generally available may not be used for private gain.

The Standards include a prohibition against engaging in financial transactions using nonpublic information, or allowing the improper use of nonpublic information to further private interests.

Most of the prohibitions against use of official information are applicable to the regulations governing conflict of interest. However, the HHS regulations governing use of official information prohibit an employee from allowing others to make use of official information. Government employees are sometimes able to obtain information about an action the Government is about to take or some other matter that is not generally known. The HHS regulations state that information of this kind shall not be used by the employee to further his or her or someone else's private financial or other interests. Such a use of official information is clearly a violation of a public trust. Employees shall not, directly or indirectly, make use of official information not made available to the general public, for the purpose of furthering any private interest.

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## PROTECTING THE INTEGRITY OF THE ACQUISITION PROCESS

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The term, "integrity of the acquisition process," in this instance, means allowing private sector firms to compete for the Government's business on a scrupulously fair basis. The emphasis here is on the word **fair**. Not only is fairness a prerequisite in Government acquisition due to the Government's unique position as representative of the American people, but fairness also helps ensure that the Government will obtain its supplies and services at the best price available.

Government personnel who are associated with the acquisition process have a responsibility to protect its integrity, maintaining



fairness in the Government's treatment of all vendors. There are numerous points within the acquisition process where the potential to lose this fairness is high. For example:

**Pre-solicitation.** Allowing a vendor or vendors access to information on a particular acquisition (especially the specification or work statement) before such information is available to the business community at large may give the vendor(s) receiving the information an unfair advantage over others.

**Specifications.** Intentionally writing an unnecessarily restrictive specification or work statement that would effectively exclude the products or services of a vendor and/or increase the prospects for award to another vendor is an obviously unfair practice. Not only does this give advantage to one or more vendors over others, but it also restricts competition and makes it more likely that the Government will ultimately pay a higher price.

**Confidentiality of proposals.** From the time proposals are received in response to a solicitation until a contract is awarded, all information concerning the proposals, including their number and submitters, must be held in strict confidence. Should this information become available to one or more offerors, it could put that offeror(s) at a distinct advantage.

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## PROCUREMENT INTEGRITY ACT

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Following is a somewhat detailed discussion of the Procurement Integrity Act. This somewhat controversial piece of legislation is relatively new; however, it has far-reaching implications not only in numbers and types of transactions covered but also in extending to post-employment situations. In addition, this statute places restrictions on a broadly defined category of Government employees as well as on contractors.

The "procurement integrity" statute, 41 U.S.C 423 (the "Act"), was enacted to prevent improper practices in the procurement of supplies and services. The Act prohibits certain activities by competing contractors and Government procurement officials during the conduct of a Federal agency procurement. In general, these prohibited activities involve:

- soliciting or discussing post-Government employment,
- offering or accepting a gratuity, or

- soliciting or disclosing proprietary or source selection information.

The Act also contains certification and disclosure provisions for both contractors and Government officials serving as "procurement officials", imposes post-employment restrictions on Government officials and employees, and provides for criminal, civil, administrative, and contractual penalties for violations of the Act.

In determining the applicability of the Act, it is necessary to determine whether a Federal employee is a "procurement official". The Department of Health and Human Services Acquisition Regulation, at 303.104-4(b)(1), supplementing the Federal Acquisition Regulation's Section 3.104 implementation of the Act, defines "procurement official" as:

- Any individual who has participated personally and substantially in the conduct of a procurement, [regardless of the dollar value of the procurement]. The following classes of employees may be considered procurement officials depending on the circumstances prevailing in a given case: contracting officers, contract specialists, contract administrators, procurement agents, procurement clerks, cost/price analysts, procurement analysts, auditors, professional staff of the Division of Cost Allocation, acquisition review and approval officials, contract clearance staff, board of award members, supervisory procurement officials, small and disadvantaged business utilization specialists, project officers, project managers, program officials, officials who provide special program clearances and approvals, program managers, technical evaluation panelists, peer reviewers, source selection evaluation board members, source selection advisory council members, source selection authorities, finance officials, and procurement lawyers. Concept peer reviewers are not considered to be procurement officials when participating in project concept reviews pursuant to 42 CFR 52h.10(a). However, concept peer reviewers, or other peer reviewers, who participate in a project approach review are procurement officials. When there is a question whether an individual is a procurement official, the activities of the individual should be analyzed by the contracting officer to determine whether there is both personal and substantial involvement in a procurement. If there is doubt in a particular case, the doubt should be resolved by including the individual as a procurement official. The contracting officer has the authority to decide who is or who is not a procurement official in a particular case. The opinion of the Office of the General Counsel (OGC) should be requested when the contracting officer believes the situation is particularly complex or sensitive. When the contracting officer's decision is disputed by the individual whose status as a procurement

official is in question, the matter will be referred to the Principal Official Responsible for Acquisition (PORA) for a final determination.

"Personal and substantial" means "active and significant involvement of the individual in activities directly related to the procurement."

Having determined when an employee is a "procurement official", it is necessary to understand what "during the conduct of a Federal procurement" means in order to avoid the prohibited actions. The Act provides that the conduct of a procurement begins "on the earliest specified date on which an authorized official orders or requests" one the following actions:

- The drafting of a specification or work statement developed for that procurement.
- The review and approval of a specification or work statement developed for that procurement.
- The preparation or issuance of a procurement solicitation in that procurement.
- The evaluation of bids or proposals for that procurement.
- The selection of sources for that procurement.
- The conduct of negotiations in the procurement.
- The review and approval of the award, modification, or extension of a contract in that procurement.

Therefore, the prohibitions in the Act apply from the earliest point listed above for a given procurement. That means that general discussions with vendors who are trying to sell their products are acceptable unless their products can satisfy the requirements of an ongoing procurement. In that case, Government officials should not engage in discussions with the vendor, and should be noncommittal regarding any disclosures of pending procurements.

The Office of Federal Procurement Policy and the Office of Government Ethics developed a training module which is used by the Department's Operating Divisions ( OPDIVs) and Regional offices to train procurement officials. Each procurement official must read the training module and sign the "Procurement Official's Certificate of Procurement Integrity" before he\she can act as a procurement official on any procurement.

#### Soliciting or Discussing Employment

The Act allows some procurement officials to obtain permission to withdraw from further participation in a procurement in order to discuss future employment with a competing contractor. An eligible procurement official may, in accordance with specific procedures in the regulations, request authorization to be recused from participation in the procurement. A procurement official is not eligible for recusal if, during the period beginning with the issuance of a procurement solicitation and ending with the award of a contract, he or she has participated personally and substantially in the evaluation of bids or proposals, the selection of sources, or the conduct of negotiations. An individual may not commence discussions with a competing contractor until he or she has received written approval of the recusal request. Rejection of an employee's recusal request is not an adverse personnel action.

#### Offering or Accepting a Gratuity

The phrase "gratuity or other thing of value" is defined to include any gift, favor, entertainment, transportation, lodgings, meals, services, training, or other item having monetary value. It does not include: (1) any unsolicited item having a market value of \$10 or less presented or presentation; (2) loans from banks and financial institutions; (3) discounts available to the general public; (4) plaques and certificates having no intrinsic value; (5) anything paid for the Government, secured under Government contract or accepted by the Government under specific statutory authority; or (6) training to facilitate use of its products provided by a vendor whose products are furnished under Government contract.

#### Disclosing Proprietary or Source Selection Information

During the conduct of any procurement, no person who has access to proprietary or source selection information shall make unauthorized disclosure of that information. This prohibition applies to all Federal employees, not just procurement officials.

#### Post-Employment Restrictions

After leaving Government employment, employees who were procurement officials are also prohibited from participating in certain types of activities with competing contractors for a period of two years after personal and substantial participation in a particular procurement. The Act states:

No individual who, while serving as an officer or employee of the Government, or member of the Armed Forces, was a procurement official with respect to a particular procurement may knowingly - (A) participate in any manner, as an officer, employee, agent, or representative of a competing contractor, in any negotiations leading to the award, modification, or extension of a contract for such procurement, or (B) participate personally and substantially on behalf of the competing contractor in the performance of such contract,

during the period ending 2 years after the last date such individual participated personally and substantially in the conduct of the procurement or personally reviewed and approved the award, modification, or extension of any contract for such procurement.

Questions related to individual post-employment situations should be directed to the Office of the Office of the Special Counsel for Ethics or the office of the General Counsel, Business and Administrative Law Division.

Although the above-mentioned requirements may have some punitive aspects in the event they are violated, they should be understood in terms of their basic intent, i.e., to ensure the integrity of these processes. They also assist individuals to withstand pressures to approve the expenditure of funds for purposes/recipients that could not otherwise stand the tests of objective evaluation. If they are violated, however, individuals can expect serious consequences. There are documented instances of individuals spending time in jail, being fired or removed from positions of influence and contractors being debarred as a result.

#### DO's and DON'Ts

The following is not an exhaustive listing, but indicates some known pitfalls to avoid or be aware of and supplements the previous information.

**DON'T** make commitments of any type to provide funding to non-Federal sources or solicit "unsolicited" proposals as a means of making funds available. Examples include promises to support conferences or meetings, to make up a shortfall in non-Federal funding, etc. If such requests can be anticipated, **DO** seek the advice and assistance of cognizant contracts personnel as to propriety of the action and the choice of legal instrument.

**DON'T** provide any information to non-Federal sources or other Federal employees who do not have "a need to know" about any planned or pending contract. Certain information, i.e., proprietary or source selection information, is prohibited from being released, and the release of other information may be inappropriate in a given instance. **DO** refer any requests for information, either written or oral, about planned or pending actions to cognizant contracts personnel.

**DON'T** accept money or anything of more than nominal value either as an individual or on behalf of the organization from any non-Federal organization. Promotional material such as pencils or magnets are considered to have nominal value. **DO** consult cognizant contracts personnel about the propriety of participating in vendor promotional training. **DO** participate in demonstrations of product capability as a means of determining potential sources but only as

a general source of information and not in relation to a requirement for which the acquisition process has already begun.

**DO** ensure that you disclose your financial interests in any organizations to whom HHS may potentially award grants or contracts.

**DON'T** requisition for equipment or supplies that are not essential for HHS operations or mission accomplishment or use or allow others to use Government-owned equipment or supplies for unauthorized purposes.

**DO** use common sense. If you are being asked to do a favor in making funding available or a project has sensitivities attached to it, either political, social or economic, bring it to the attention of your management, as well as contracts and/or legal staff.

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## **SEXUAL HARASSMENT**

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The HHS regulations define sexual harassment as deliberate unsolicited verbal comments, gestures, or physical contact of a sexual nature that are unwelcome. The regulations specifically prohibit this conduct in relationships between Department personnel who take or recommend action on a grant or contract and the grantee or contractor.

## GLOSSARY OF ACQUISITION TERMS

**Acquisition.** Using appropriated funds to acquire supplies or services by contract by and for the Federal government through purchase or lease. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

**Acquisition Planning Schedule.** A time schedule planned jointly by the contract negotiator and project officer for accomplishing the major milestones in the placement of a contract. It is part of the acquisition plan.

**Annual Appropriations.** An appropriation that is available for incurring obligations only during the single fiscal year specified in the appropriation act.

**Apparent Authority.** This is a private sector term for the situation that is created when a principal acts in such a manner that another appears to be his or her agent. Apparent authority creates an agency relationship where none existed previously, or establishes authority other than actual authority. In commercial contracts, the principal is liable for the acts of its agent performed within the limits of the agent's apparent authority. However, this does not apply to the Government or Government contracts.

**Bid.** An offer submitted in response to a formally advertised invitation for bids, to buy from or furnish supplies or services to the Government under certain prescribed conditions at a stated or determined price; or the act of submitting a bid.

**Business Evaluation.** Measuring a business proposal against the business requirements of the acquisition and rating the proposal accordingly.

**Commerce Business Daily.** A daily list of U.S. Government acquisition invitations, subcontracting leads, contracts awarded, sales of surplus property, and foreign business opportunities.

**Competition Advocate.** The person within each acquisition activity responsible for challenging barriers to, and promoting, full and open competition.

**Contract Administration.** The management of all facets of the contracts to ensure that the contractor's total performance is in accordance with its contractual commitments and that the obligations of the Government are fulfilled.

**Contracting Officer.** The individual appointed as the Government's authorized agent in dealing with the contractor. This individual has authority to negotiate and award contracts on behalf of the Government and to make changes and amendments to the contract.

**Contract Negotiator.** The individual assigned to negotiate the contract up to, but not including, the point of signature. The contracting officer who signs the contract may act as the contract negotiator.

**Cost Advisory Report.** A commentary on the price and cost analysis of the offeror's proposal.

**Determination and Findings.** A special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contract actions. The "determination" is a conclusion or decision supported by the "findings." The "findings" are statements of fact or rationale essential to support the determination and must cover each requirement of the statute or regulation.

**Federal Acquisition Regulation (FAR).** The regulation governing civilian Federal executive agencies in the acquisition of supplies and services with appropriated funds.

**HHS Acquisition Regulation (HHSAR).** The Department regulation applicable to HHS acquisition activities that implements and supplements the FAR. These regulations are prescribed under 5 U.S.C. 301 and Section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended.

**Level of Effort.** This type of contract obligates the contractor to devote a specified level of effort for a stated period of time. Usually the minimum and maximum number and type of person -hours or person-months that the Government is purchasing are specified in the contract.

**Negotiation.** This term refers to the making of purchases and contracts without using sealed bid procedures. Under negotiated contracts, the lowest offeror does not necessarily receive the award. Award is made on the basis of the proposal that offers the greatest advantage to the Government, price and other factors considered.



**Negotiation Memorandum.** This is a complete record of all actions leading to the award of a contract. It records the history of the acquisition and explains and supports the rationale, judgments, and authorities upon which all decisions and actions are predicated.

**Offeror.** An individual or firm responding to a solicitation.

**OPDIV.** Operating Division.

**Phasing.** The dividing of the contractual effort into discrete components or stages of accomplishment, each of which must be completed and approved before the contractor may proceed to the next phase.

**Pre-award Survey.** Investigation of a firm's management and resources in order to forecast the potential to perform under a proposed contract or to reveal whether the offeror's financial and accounting systems are reliable for cost accumulation and billing.

**Prenegotiation Conference.** Meeting of the Government negotiation team in which negotiation goals are developed prior to negotiation with the contractor.

**Principal Official Responsible for Acquisition (PORA).** The official subordinate to the head of the contracting activity who is in charge of the major contracting operation activity within the OPDIV, agency, staff office, or regional office.

**Project Officer.** A program representative responsible for coordinating with acquisition officials on projects for which contract support is contemplated. This representative is responsible for technical monitoring and evaluation of the contractor's performance after award.

**Proposal Evaluation Criteria.** Criteria against which proposals are evaluated. The RFP must explain these factors and their order of importance.

**Renewal.** An agreement to an existing contract for continuation of work with the incumbent contractor.

**Request for Contract (RFC).** The document requesting acquisition action and facilitating development of the request for proposal. This document completes the acquisition planning phase and begins the solicitation phase.

**Request for Proposal (RFP).** The Government's invitation to prospective offerors to submit a proposal based on the terms and conditions set forth in the RFP.

**SADBUS.** The Small and Disadvantaged Business Utilization Specialist, who administers the OPDIV's socioeconomic acquisition

programs.

**Sealed Bidding.** The method of making contracts through the public opening of bids and award to the lowest responsible, responsive bidder based on detailed specifications.

**Section 8(a).** The section of the Small Business Act (15 USC. 631 et. seq.) requiring that a portion of each agency's acquisitions be set-aside for small disadvantaged business concerns, defined as a small business concern that (a) is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or a publicly owned business having at least 51 percent of its stock owned by one or more socially disadvantaged individuals and (b) has its management and daily business controlled by one or more such individuals.

**Set-Aside.** The restricting of certain acquisitions to response by a specific group of sources.

**Sources for Solicitation.** Prospective offerors to whom the request for proposal will be sent, even though not requested.

**Statement of Work (Scope of Work).** The document that states the technical objectives and requirements of the contract.

**Supplemental Agreement.** A modification of an existing contract that is accomplished by the mutual action of the parties.

**Synopsis.** A short description of a Government acquisition published in the Commerce Business Daily for one of the following purposes: (1) alerting interested parties to an upcoming acquisition; (2) finding sources to provide services or items to the Government; or (3) informing interested parties of the result of a acquisition.

**Technical Evaluation.** Measuring a technical proposal against the technical requirements of the acquisition data and rating the proposal accordingly.

**Two-Step Sealed Bidding.** This acquisition method is designed for use when adequate specifications are not available. Step one consists of the request for, submission, evaluation, and (if necessary) discussion of a technical proposal. No pricing is involved. Step two involves the submission of sealed price bids by those who submitted acceptable technical proposals in step one.

**Unsolicited Proposal.** A research and development proposal that is made to the Government by a prospective contractor without prior formal or informal solicitation from a procuring activity.

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